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CASES ON WATER RIGHTS

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CASES

ON THE LAW OF

ΓER RIGHTS

SELECTED AND ARRANGED

BY

JOSEPH W. BINGHAM
Professor of Law, Stanford University

INDIANAPOLIS
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TO

JOSEPH HENRY BEALE *and* JAMES PARKER HALL

AS A SMALL TOKEN OF APPRECIATION

OF THEIR MASTERY OF THE CASE METHOD

AND THEIR ENCOURAGEMENT OF

INITIATIVE AND INDEPENDENT THOUGHT IN THEIR STUDENTS

PREFACE

In compiling and editing this case-book, I have tried to direct the work by a constant memory of its very limited purposes. In no sense is it offered as a treasury of authorities or even of leading cases; and certainly it does not pretend to have the comprehensive scope which would be demanded of a text-book. It is designed to furnish students and instructor with a carefully selected and arranged lot of material for common study and discussion, as a basis for the development of definite elementary principles and rules concerning an important field of property law. That is its only purpose.

No law-school subject can be studied adequately and comprehensively, in the limited number of hours which expediency affords it. Particularly is this true of water rights. It usually is regarded as an extra subject and is allotted scant time in a crowded curriculum. Perhaps it is my great interest in this very live and growing body of law which causes my belief that too little recognition has been given hitherto to its intrinsic interest, importance and complexity. Three hours a week throughout a semester—or at least two hours a week—should be devoted to it; and in this time, a thorough knowledge of only its main principles can be attained.

Here, as elsewhere, then, it has been necessary to pick and choose —to select those matters for intensive discussion which seemed most important pedagogically and to leave much entirely untouched and some things barely noticed. My scheme of selection has been roughly the following. The theme of the book concerns rights and liberties of taking water from a natural source of supply. It scarcely touches on ditch rights and liberties to carry water across the lands of others; and it does not touch at all upon the liability for damages done to the land of others by escape or flowage of water. Such topics are sufficiently covered by other courses. I have tried to concentrate attention on the development of a limited number of principal ideas and considerations, which underlie and permeate the law of water rights, and to give enough cases on each of the phases selected to enable the student to see these considerations definitely, accurately and precisely and to acquire efficiency in their use. Throughout, I have assumed that the student will have an elementary knowledge of property law, conveyancing, contracts, equity, constitutional law and public service law, or that this collateral knowledge will be supplied by the in-

structor. Likewise I have proceeded on a conviction that a case-book can not at once properly fulfill its main purpose and encroach upon the field of instructor and text-book. I assume that the elementary ideas which are developed by these cases will be supplemented by much additional information and comment given by the instructor, and perhaps by assigned reading in text-books.

In this connection, it will be observed that I have not treated the great amount of legislation with any degree of thoroughness. Most of the Federal legislation, such as the Carey Act and the National Reclamation Act, and much of the state legislation is without the scope of the course; although some of it may be worthy of a collateral reference by the instructor. Such state legislation as is within the scope of the course and does not deal with administrative or procedural matters only, is either merely declaratory of judge-made principles or so casual and ununiform that it has seemed best in most instances to leave to the instructor the task of calling the attention of the class to it. A little of it, however, has been treated in the main text, and references to more will be found in the footnotes.

The administrative and procedural provisions of the state legislation, including the provisions that a certain routine be followed in initiating and perfecting a water right and for maintaining a record of priorities, vary so much in detail that they can not be treated adequately in a lump. This is a matter for local study. It has seemed best to include no cases on the details of these systems. Such information concerning them as the individual instructor thinks expedient to cover in the course, can be imparted more advantageously in lectures and by reference to the statutes, text-book passages, and a few locally important cases. I have not included the legislation itself within the book, because of the great amount of space which would be used and because the period of experiment and frequent legislative changes has not yet passed in all the states.

I have deemed that legislation concerning irrigation districts, the formation and regulation of water corporations, and the administrative control of public service, either is beyond the special scope of the course, or can be treated more expediently by the instructor with collateral lectures and references.

The view that I was compiling a case-book for class use, and not a text-book, has influenced my use of footnotes also. I have avoided making any statement of my own concerning the law. In no instance have I attempted to cite extensively the authorities pro and contra; or even to indicate my view of the weight of reason or of authority. In connection with adequate class room discussion and instruction, such information is at the best of very slight value to the student, and, according to the opinion of able teachers with whom I have discussed the matter, it sometimes detracts seriously from the utility of a book. Of course, the teacher, himself, will use extensively text-books and digests, notes or no notes. My theory of the proper purpose of footnotes in a case-book is that they should contain citations

to cases, legislation, or texts, which are interesting for purposes of comparison or which suggest either ideas with a useful bearing on the principal cases or collateral facts that may well be brought out in the discussion or comment and might not occur to the instructor at that particular juncture. Citations of cases in point that would not easily be found in digests or text-books also are welcome additions to a case-book.

Every worker in the field of the law owes a debt to those who have preceded him which is difficult of estimate and statement. All honest scholars take it for granted that an acknowledgment of this debt will be implied without express assessment. In addition to the American Digest system, three books have given me valuable aid in finding authorities for use. The second volume of Gray's Cases on Property introduced me to a number of interesting cases, quite early in my studies. The other two books are the treatises of Mr. Farnham and Mr. Samuel C. Wiel.

My thanks are due to my colleague and friend Mr. Charles A. Huston, for valuable advice concerning the inclusion of several cases.

JOSEPH W. BINGHAM.

Stanford University,
January 3, 1916.

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Cases on Water Rights and Irrigation

CHAPTER I

EXTENT OF RIPARIAN RIGHTS AND LIBERTIES

Section 1.—Use for Power

BRITTON, BALDWIN'S EDITION OF NICHOLS' TRANSLATION
pp. 289-290

5. Sometimes the soil is subject to a servitude by law, although not by any man's appointment, or by the establishment of peaceable seisin, as, for example, to the obligation that no one shall do anything in his own soil that may be a grievance or annoyance to his neighbor; of which annoyances there are various sorts; for some annoyances may be lawful, and in particular such as no neighbor can forbid another to do, as to erect a mill on his own soil; and some may be tortious, as if any one do in his own soil a thing which is a grievance to his neighbor, and which he by law may be prohibited from doing. For the law forbids any one to raise or heighten his pond so as to drown the tenement of his neighbor, or to make a ditch in his own soil whereby the water is diverted from his neighbor, or whereby it is hindered from remaining in its ancient course, or to do any act in his own soil whereby his neighbor may be less able to use his seisin of the servitude wherewith the soil is bound and charged to him, or to use his peaceable seisin where and when he ought, in all such ways as he was wont and ought to use it, in number, kind, quality, and quantity.

ANONYMOUS

Year Book 12 Edward III, Horwood's Edition, p. 464

The Assize came to recognize if James de T., J. B., and J. L. unjustly etc. diverted the course of a certain water in L. to the injury of the freehold of T. C. in L., since the first etc. And whereof the said T. complains that whereas there is a certain spring in L. from which spring the said water was wont to have its course to the messuage of the said T. in L., in which he dwells, and from the said messuage to ten acres of his meadow in the same vill, with which water he has wont to water his cattle, namely, horses, sheep and cows, and also to fish therein and brew therewith, and water the aforesaid meadow in time of drought, and do other needful things therewith, the aforesaid J. J. and J. made a certain trench across the course of the said water in L. aforesaid between the spring and the messuage aforesaid, so that whereas he was wont to get for the said messuage 40s. by the year now he can only get 20s.; and whereas he was wont to have from the aforesaid meadow 60 cartloads of hay, now he has only 10 cartloads of hay. And likewise he has to go for water for his necessary occasions for the distance of a mile from the said message, and so to the injury etc. And James comes and all the others come not; but a certain Adam Rous answers for them as their bailiff, and on their behalf says nothing whereby the Assize should tarry. Therefore against them let the Assize be taken etc. And James says that he is parson of the church of L. and tenant as in right of his said church of the soil in which the injury is assigned in common with Isabel de D., Thomas de B., and P. de B. who are not named in the writ, and he is not named "parson" etc., wherefore he demands judgment of the writ etc. And if etc., then he says that the aforesaid trench was made in the time of the ancestor of the said Thomas and of the predecessor of the said James etc. And if etc. then he says nothing why the Assize should tarry. So let the Assize be taken thereon etc. The recognitors thereto chosen tried and sworn come etc., and say on their oaths that the said James is tenant as in right of his said church in severalty of the soil put in view and in which the said trench is made, and not in common as the same James above alleges. And they say that the said James made the said trench in his own time and in the time of the said Thomas. The recognitors were asked by the Court what the damages were, if etc.; and they say to the damage of the said Thomas of two marks. They were asked if all those named in the writ were present at the doing of the said injury, and if the injury were done with force and arms. And they said that it was so. And because the court is not yet advised to give judgment at present on the verdict of the said Assize, a day is given to them before the said Justices at Westminster, on such a day, to hear their judgment. At

which day they come before the said Justices at Westminster, and the said parties on both sides being present demand judgment on the verdict of the said Assize. Therefore it is considered that the said nuisance be abated, and that the said water be turned into its former course at the expense of the said J. J. and J., and that the said Thomas recover against them his damages assessed at two marks, and that the said J. J. and J. for the nuisance committed with force and arms should be taken etc.

BEALEY *v.* SHAW AND OTHERS

1805. COURT OF KING'S BENCH

6 *East* 208

This was an action on the case, wherein the plaintiff declared, that on the 1st of January, 1799, he was possessed of certain lands, mills, and other buildings and machinery used in his trade of a whitster, and that a stream of water used to flow out of the river Irwell through a water-course through his land, and was used to work his said mills and machinery; and that the defendants then, etc., injuriously widened, deepened, and enlarged certain fenders, sluices, and watercourses, leading out of a part of the river Irwell higher than the commencement of the plaintiff's stream, and thereby drew off and diverted from the said river a greater quantity of water than used to flow and ought to have flowed into the defendants' fenders and sluices, and continued the same so widened, etc., and the water so drawn off from thence hitherto, and thereby prevented the same from flowing to the premises, etc., of the plaintiff, by which he was deprived of the advantage of the said stream, etc. There were several other counts stating in substance the same grievance in different ways. Plea, Not guilty. At the trial before Graham, B., at the last Lancaster assizes, the short state of the case in evidence appeared to be this:—The plaintiff's and the defendants' mills and works were both situated near the banks of the river Irwell, from the water of which they were supplied. The first diversion of the river was in 1724, when a mill was erected on the defendants' premises by those from whom they claimed, and a weir was made above, and the water brought from the river by means of a sluice, adequate in quantity to the wants of the then owners; the remainder (which was more or less according to the season, and sometimes but little in dry weather) continuing to flow as before in the natural channel. Another weir was built by the owners of the same premises about 40 years ago, and a third about 20 years ago; and as the works were from time to time enlarged, more water was taken from the Irwell

to supply them, and no objection made, there being then no other mill on the stream in that part of the country. The present weir of the defendants was made by Messrs. Potter and Crompton (from whom the defendants immediately claimed) when they were in possession of the same premises in 1791. It was made about forty yards higher up the river; and at the same time the sluice by which their works were supplied was considerably widened and deepened, so that nearly double the quantity of water was drawn from the Irwell which had ever before been taken. The plaintiff's works were first erected in 1787, and his weir and sluice then first made upon his premises, which were situated lower down the stream, and between the works of the defendants and the tail of their sluice where the water was again returned into the bed of the river, which there made a great bend. In consequence of the alteration of the defendant's sluice in 1791, by which so much more water was taken from the bed of the river above the plaintiff's works than before, they were materially impeded, and sometimes obliged to stop working altogether. Before that time there was no complaint of want of water; but then disputes began concerning it: and the defendants still attempted to exercise acts of exclusive occupancy of the water after the complaints originated; for they put a lock on the clough, the key of which was kept by them for three years together; and applications were several times made by the plaintiff's foreman to know when it would be convenient to the defendants to let the plaintiff have some water; and he was told that he should have it when Shaw's work was done. But it was agreed that a person should be kept to watch the management of the clough, so that the plaintiff might have the water immediately at all times when it was not necessarily used by the defendants: and this person was paid by both parties for his trouble; though he was in the employ of the defendants, and was desired by one of them after the enlargement of their sluice was made, to keep the plaintiff quiet. The defendants called no witnesses; but it was contended on their behalf that they and the persons from whom they claimed, having since the year 1724, down at least to 1787, had the free and exclusive enjoyment of so much of the river as they thought proper to appropriate to themselves, increasing the quantity from time to time as their occasions required, it was not competent to the plaintiff at the latter period to abridge their right by the erection of new works and making a new weir and sluice; but having placed himself between their weir and their mill-goit, he must take the river subject to the defendants' use of it. That the plaintiff could acquire no right to the use of any part of the river water adversely to the defendants, by any enjoyment short at least of 20 years; and here they had only had an enjoyment for less than four years of the superfluous water, which the defendants had then no occasion for: and they, having had an unlimited use of the river for so long before 1787, could not lose that right by a non-user for so short a period; but were at liberty to appropriate to them-

selves as much more as they wanted, in the same manner as they had several times done before the plaintiff's works and sluice were erected and made. But that if any action lay, it should have been brought against Potter and Crompton by whom the increased quantity of water had been originally taken in 1791, which the plaintiff had acquiesced in, and not against the defendants who had purchased under such acquiescence. The learned judge however considered that the important period for the jury to attend to as to the question of right was in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice; before which time the plaintiff's works had been erected; and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claimed. That persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use. That every such exclusive right was to be measured by the extent of its enjoyment; and if Potter and Crompton had in 1791 taken more water from the river than had ever been done before by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left to himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged was a continuance of the injury, for which an action lay. That the applications by the plaintiff's foreman for leave to take the water, and the defendants having kept the key of the clough which regulated the supply of it, though strong, were not conclusive evidence against the plaintiff, but might have been done under an ignorance or misapprehension of his rights at the time. Under this direction the jury found a verdict for the plaintiff, with nominal damages; which was moved in last Hilary term to be set aside, upon a supposed misdirection of the judge, in point of law, upon the evidence; the grounds being, 1st, That the evidence of exclusive enjoyment by the defendants, and those from whom they claimed of as much of the water as they had occasion for, increased from time to time as more was wanted from 1724 downwards, was evidence to be left to the jury of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under 20 years' quiet enjoyment. 2dly, That here was evidence of an acquiescence on the part of the plaintiff in the defendants' claim.

* * *

LORD ELLENBOROUGH, C. J.: I see no ground for disturbing the verdict. If the whole evidence were left to the jury as stated by the learned judge, there can be no question upon it; and if the verdict had been for the defendants, I think it could not have been sustained.

The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist, founded on the occupation of another. And though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long time as may raise the presumption of a grant, the other party whose land is below, must take the stream, subject to such adverse right. I take it, that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption according as it is attended with circumstances to support or rebut the right. Here it appears, that from 1724 downwards, there has been a partial enjoyment of the water of this river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff in 1787 comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years, without objection from any person. Supposing the question had arisen then on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objections could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of all the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works, and for the very purpose of appropriating to themselves more of the water they enlarged their sluice? After this enlargement was made of the defendants' sluice in 1791, complaints began; and in order to avoid dispute it was agreed that the fender should be kept by a man who was employed for that purpose by both parties, and paid by both: and it appears that he was privately directed by one of the defendants to keep the plaintiff quiet during the time. But why keep the plaintiff quiet if he had no right, which it was apprehended he might assert? It is enough however, to say, that after the enlargement of the defendants' sluice, it was a disputed right of enjoyment of the water; and no grant could have been presumed by the jury on such a contested enjoyment. It amounts to no more than this, that the plaintiff, to avoid litigation, agreed during that time to receive his right in a manner more abridged than he need have done; but afterwards, when the attempt was made to take all the water from him, he stood, as he lawfully might, upon his strict rights, and brought his action for the obstruction. Upon the whole therefore it

is evident, that down to 1791, the defendants' right to the water had only been exercised in a limited manner; and no objection can be made to the direction of the learned judge: and as to their enjoyment between 1791 and 1803, there was nothing to leave to the jury on which to presume a grant.

GROSE, J.: The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it in respect of the premises which they occupied higher up the river. To what extent then did that go? It appears that prior to the year 1791 the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that weir, which had not been carried off by such sluice. Then, in 1791 Potter and Crompton convert the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it: by so doing they encroached on his right, and deprived him of a benefit which was attached to his estate. It was an extension of the right before exercised by them, and a material injury to the plaintiff. But then it is said, that subsequent to the enlargement of the defendants' sluice in 1791, they kept the key of the clough, and there was an acquiescence of the plaintiff, and that he asked leave to take the water when it was not wanted by the defendants. But the whole that it amounts to is this, That all the evidence of the right being with the plaintiff down to 1791, for a small space of time afterwards (about three years) rather than have a dispute with the defendants, he consented to this arrangement, by which he expected to have the benefit of the water with their consent. But that is not to be compared with the weight of evidence in support of the plaintiff's right: and if the verdict had been against him on that ground, I should have thought that there ought to have been a new trial; and consequently I can not say that this verdict is wrong.

LAWRENCE, J.: I think the law was very correctly stated by the learned judge at the trial; and the objection now made by the defendants to the plaintiff's claim is inconsistent with the ground on which they attempt to rest their own case. For they contend that they had a right to appropriate as much of the water as they pleased from time to time to their own use; and yet they deny the same right to the plaintiff to appropriate to his use what had not been appropriated before by any other person. In this the defendants are wrong; for if the occupiers of their premises could before have appropriated to themselves any part of the water flowing through their own lands, by the same rule those through whose lands it afterwards flowed might appropriate so much as had not been appropriated before by

others. The question then is reduced to this, Whether there be any evidence to show that the plaintiff was attempting to obtain more water than he had before the enlargement of the defendants' works in 1791? Now the evidence relied on, of leave asked of them for the water by the plaintiff, by no means shows that; for though in a case of doubt concerning the right to a thing, leave asked by one party of the other for the use of it would be strong evidence of the right; yet here there is clear evidence of what the right was down to that period; namely, That the defendants had only a right to all the water which they could carry off in a sluice of certain dimensions, such as they had been used to enjoy prior to the year 1791, when they took upon themselves to enlarge it after the plaintiff had applied to certain uses what had before been unappropriated by them.

LE BLANC, J.: As to whether particular facts proved in a cause should or should not be pointedly left to the consideration of the jury, much must depend upon the manner in which the case is stated to the judge and jury at the time. Now here the point insisted on by the defendants at the trial was, That as prior to the year 1787, those who occupied the defendants' premises were the only persons who had works on this stream, and had taken, from time to time, as much water as they pleased, leaving the rest to flow in the natural channel, the plaintiff who came in 1787 to an estate lower down the river, had only a right to take so much as the defendants did not choose to take at any future time. This position it was which my Brother Graham denied to be law; and I think he properly denied it; for the true rule is, That after the erection of works, and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, can not do so afterwards; therefore the evidence of the defendants' taking more of the water after the appropriation by the plaintiff in 1787, did not interfere with the rule of law as laid down at the trial. And there is no evidence which goes to show that the verdict is wrong; for as to the particular facts, which it is now said ought to have been pointedly stated for the consideration of the jury, if they were not relied on at the time, and the case was not put on that ground, it is not sufficient now to say, that such or such a fact might have applied to another view of the case.

Rule discharged.

MASON *v.* HILL AND OTHERS

1832. COURT OF KING'S BENCH

3 Barnewall and Adolphus 304

CASE: The first count of the declaration stated, that the plaintiff was lawfully possessed of a mill, manufactory, and premises in the county of Stafford, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used to run and flow, and of right ought still to run and flow unto the said mill, etc., in great purity and plenty to supply the same with water for working, using, and enjoying the same, and for other necessary purposes. That the defendants by a certain dam and obstructions across the stream above the plaintiff's premises, impounded, penned back, and stopped the water, and by pipes and tiles, &c., diverted it from the plaintiff's premises, and prevented it from flowing along the usual and proper course. And further, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done. Plea, not guilty. At the trial before Bosanquet, J., at the last Spring assizes for the county of Stafford, the following appeared to be the facts of the case. The plaintiff and the defendants had land contiguous to the stream, the land of the defendants being situate on a part of the stream above the land of the plaintiffs. The stream acted as a sewer to part of the town of Newcastle-under-Line, and the water was consequently foul and muddy. It had been unprofitable to both parties until it was diverted by the defendants. This diversion took place in 1818, by the defendants' erection of a weir or dam across the stream, at the part contiguous to their own land, and by means of this weir and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water necessary for a steam-engine. About ten years after this diversion, the plaintiff made a channel in his land contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual, or unsatisfactory; and before the action was brought, the plaintiff's works were occasionally suspended for want of the water diverted by the defendants, and which after it had been used by them was suffered to pass away into a level below the plaintiff's works. It was contended on the part of the defendants,

that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right therein, and were not answerable for the diversion, and Williams *v.* Moreland, 2 B. & C. 910, was cited. The learned judge acting upon that authority, directed the jury to find a verdict for the defendants. In the ensuing term Campbell obtained a rule nisi for a new trial, on the ground that the defendants who had diverted the water could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. * * *

LORD TENTERDEN, C. J., on a subsequent day of the term, delivered the judgment of the court.

This case was argued before us in the course of the present term on cause shown against a rule for a new trial. It was an action for diverting a stream of water, and the verdict was given for the defendants. His lordship then, after stating the facts of the case, proceeded as follows:

In this state of things the present action was brought, and for the defendants it was insisted that, they having first appropriated the water beneficially to their use at a time when the appropriation was not injurious to the plaintiff, had a right to the water and to the use of it, notwithstanding the diversion had by subsequent acts of the plaintiff become injurious to him. The plaintiff, on the other hand, insisted that the defendants did not, nor could by law, acquire a right to the water by a diversion and enjoyment for a period short of twenty years. The several decisions and dicta of learned judges on this subject were quoted at the bar, and need not be repeated. It appears to have been held that a person could not complain of a diversion or obstruction of water, from which at the time of his complaint he suffered nothing: which seems to have been on the ground that in such a case it was *injuria sine damno*. It is not now necessary to say whether such a principle should be admitted. The only decision upon a question like that in the present case is the judgment of the present Master of the Rolls, then Vice-Chancellor, in the case of Wright *v.* Howard, 1 Sim. & Stu. 190. This judgment is expressed in language so perspicuous and comprehensive, that I shall here quote it. "The right to the use of water rests on clear and settled principles. Prima facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water

which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording a conclusive presumption of a grant." The learned judge then adds, that an action will lie "at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right."

We all agree in the judgment thus delivered; and upon the authority of that decision, and the reasoning of the learned judge, we are of opinion that the defendants did not acquire a right by their appropriation, against the use which the plaintiff afterwards sought to make of the water, and consequently that the rule for a new trial must be made absolute.

Rule absolute.

DUMONT *v.* KELLOGG

1874. SUPREME COURT OF MICHIGAN

29 Mich. 420, 18 *Am. Rep.* 102

CASE: Defendant brings error. Reversed.

COOLEY, J.: The grievance complained of by Kellogg in the court below was that Dumont had constructed a dam across a natural water course, and by means thereof wrongfully detained the water in the stream to the prejudice and injury of the plaintiff, who was proprietor of a mill previously erected on the stream below. The reservoir created by defendant's dam was quite a large one, and plaintiff gave evidence that the flow of water in the stream below was considerably diminished by the increased evaporation and percolation resulting from the construction of this dam. The plaintiff had judgment in the court below, and the case comes here upon exceptions, the errors principally relied upon being assigned upon the instructions to the jury, and involving the relative rights of riparian proprietors to make use of the waters of a running stream which is common to both, and to delay its flow for that purpose.

The instructions given were numerous, and the most of them were unexceptionable. Others appear to be based upon a view of the law which is not to be reconciled with the authorities. Of these are the following:

"Every proprietor of lands on the banks of a stream, and every mill owner, has an equal right to the flow of the water in the stream as it was wont to run, without diminution or alteration; no propri-

etor has the right to use the water to the prejudice of the proprietors below him, without the consent of the proprietors below; he can not divert or diminish the quantity which would otherwise descend to the proprietors below.

"He must so use the water as not materially to affect the application of the water below or materially diminish its quantity.

"If the jury find, from the evidence, that Dumont's dam and pond have diminished, by the increased evaporation and soakage occasioned by it, the flow of the water in the Dumont creek one-third, or any other material amount, and that the plaintiff has sustained damages thereby, then the plaintiff is entitled to recover in this action.

"The rights of a riparian proprietor are not to be measured by the reasonable demands of his business. His right extends to the use of only so much of the stream as will not materially diminish its quantity, so that in this case the question whether defendant needs the water as he uses it in his business is entirely immaterial.

"The defendant had the right to build a dam upon his land, but he must so construct the dam and so use the water as not to injure the plaintiff below in the enjoyment of the same water, according to its natural course."

In endeavoring to determine the soundness of these instructions, we may dismiss from the mind the fact that the plaintiff had first put the waters of the stream to practical use, since that fact gave him no superiority in right over the defendant. The settled doctrine now is that priority of appropriation gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances as would be requisite to establish rights by prescription. Platt *v.* Johnson, 15 Johns. 213; Tyler *v.* Wilkinson, 4 Mason 397; Gilman *v.* Tilton, 5 N. H. 231; Pugh *v.* Wheeler, 2 Dev. & Bat. 50; Hartzall *v.* Sill, 12 Pa. St. 248; Gould *v.* Boston Duck Co., 13 Gray 442; Wood *v.* Edes, 2 Allen 578; Parker *v.* Hotchkiss, 25 Conn. 321; Heath *v.* Williams, 25 Maine 209; Snow *v.* Parsons, 28 Vt. 463; Bliss *v.* Kennedy, 43 Ill. 67; Cowles *v.* Kidder, 24 N. H. 378. It is not claimed that any question of prescription is involved, and the case is consequently to be regarded as only presenting for adjudication the relative rights of the parties at the common law to make use of the flowing waters of the stream, unaffected by any exceptional circumstances.

And in considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from a proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters; for this also is wholly wrongful, and no question

of the reasonableness of his action in causing the diminution can possibly arise. And had the instructions which are excepted to been given with reference to a case of diversion, or of obstruction by a stranger, the broad terms in which the responsibility of the defendant was laid down to the jury might have found abundant justification in the authorities.

But as between two proprietors, neither of whom has acquired superior rights to the other, it can not be said that one "has no right to use the water to the prejudice of the proprietor below him," or that he can not lawfully "diminish the quantity which would descend to the proprietor below," or that "he must so use the water as not materially to affect the application of the water below, or materially to diminish its quantity." Such a rule would be in effect this: that the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

Cases may unquestionably be found in which the rule of law is laid down as broadly as it was given by the circuit judge in this case, but an examination of them will show either that the facts were essentially different, or that the general language was qualified by the context. Thus the language employed in the first instruction as above given seems to have been quoted from Lord Tenterden in Mason *v.* Hill, 3 B. & Adol. 312. But there it had reference to a case of diversion of water, and was strictly accurate and appropriate. The same language substantially is made use of in Twiss *v.* Baldwin, 9 Conn. 291; Wadsworth *v.* Tillotson, 15 Conn. 373; Arnold *v.* Foot, 12 Wend. 331; and probably in many other cases, and is adopted by Chancellor Kent in his Commentaries (vol. 3, p. 439). See also Bealey *v.* Shaw, 6 East 208; Agawam Canal Co. *v.* Edwards, 36 Conn. 497; Williams *v.* Morland, 2 B. & C. 913; Mason *v.* Hill, 5 B. & Adol. 1; Tillotson *v.* Smith, 32 N. H. 95. But as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream

above and below."—Shaw, Ch. J., in Cary *v.* Daniels, 8 Metc. 477. "The common use of the water of a stream by persons having mills above, is frequently if not generally attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation: that if in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law in that case will interpose and limit this common right so that the owners of the lower mills shall enjoy a fair participation."—Woodworth, J., in Meritt *v.* Brinkerhoff, 17 Johns. 321. It is a fair participation and a reasonable use by each that the law seeks to protect. Such interruption in the flow "as is necessary and unavoidable by the reasonable and proper use of the mill privilege above," can not be the subject of an action.—Chandler *v.* Howland, 7 Gray 350; and see Embrey *v.* Owen, 6 Exch. 353; Hetrich *v.* Deachler, 6 Pa. St. 32; Hartzall *v.* Sill, 12 Pa. 248; Pitts *v.* Lancaster Mills, 13 Metc. 156; Bliss *v.* Kennedy, 42 Ill. 68. As was said by Mr. Justice Story in Tyler *v.* Wilkinson, 4 Mason 401, to hold that there can be no diminution whatever, no obstruction or impediment whatsoever, by a riparian proprietor in the use of water as it flows, would be to deny any valuable use of it. There may be and there must be allowed of that which is common to all a reasonable use by each. And if further authorities are important, Palmer *v.* Mulligan, 3 Caines 308; Dilling *v.* Murray, 6 Ind. 324; Snow *v.* Parsons, 28 Vt. 459; Hayes *v.* Waldron, 44 N. H. 580; Davis *v.* Getchell, 50 Maine 602; and Clinton *v.* Myers, 46 N. Y. 514, may be referred to. It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.

We think the court erred also in declining to instruct the jury on defendant's request that in determining the question of reasonable use by the defendant they might consider, among other things, the general usage of the country in similar cases. As was said in Gould *v.* Boston Duck Co., 13 Gray 452: "Usage is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience of such use." And see Thurber *v.* Martin, 2 Gray 394; Snow *v.* Parsons, 28 Vt. 459. Indeed in most cases this proof is the most satisfactory and conclusive that

could be adduced, being established by the parties concerned, who understand better than any others what is reasonable and convenient, and who would not be likely to acquiesce in any thing which was not so.

These errors render it necessary to order a new trial. Some of the rulings on the admission of evidence seem to have been very liberal, but we are not satisfied that they exceeded the bounds of judicial discretion.

The judgment will be reversed, with costs, and a new trial ordered. [1]

The other justices concurred.

PITTS ET AL. *v.* THE LANCASTER MILLS

1847. SUPREME JUDICIAL COURT OF MASSACHUSETTS

13 *Metc.* (*Mass.*) 156

This was an action of trespass upon the case; and the declaration alleged that Samuel Carter was seized and possessed of a close, water mill, ancient dam, and the water privileges thereto appertaining, situate on the north branch of Nashua River, in Lancaster, and the right of having the whole water of said stream flow, without obstruction, for the benefit of said mill, and of having the uninterrupted use and occupation of said mill and privileges; and that said Carter, being so seized and possessed, leased the said premises, for a term of years, to Hiram Pitts, who underlet the same to the plaintiffs; that the defendants, a corporation established by Stat. 1844, ch. 20, in the months of June and July, 1845, wrongfully built and raised, above its usual height, their dam, situate across said stream, above the mill, dam and privilege occupied by the plaintiffs, and thereby hindered the water from flowing in its usual course, and thereby, for the space of two days during the said month of June, and four days during said month of July, wholly cut off the water from the plaintiffs' mill, etc.

The case was submitted to the court upon the following agreed statement of facts: "The plaintiffs are the lessees of said mill, dam and privileges, as alleged in their declaration. The defendants were the owners of a privilege on said stream, above the mill of the plaintiffs, whereon a mill had stood for some years; they erected a new mill thereon, and, for the purpose of using the whole power, raised

[1] See Embrey *v.* Owen, 6 Exch. 353; Palmer *v.* Mulligan, 3 Caines (N. Y.) 308, 2 Am. Dec. 270; Hayes *v.* Waldron, 44 N. H. 580, 84 Am. Dec. 105, post p. 72; Snow *v.* Parsons, 28 Vt. 459, 67 Am. Dec. 723; Timm *v.* Bear, 29 Wis. 254.

the dam higher than it had formerly been, and kept the water back, so long as was necessary to fill their pond, and no longer. To have delayed filling said pond, until a freshet or flow of water should have raised the same, would have endangered said dam; and by keeping the water back, as aforesaid, the operations of the plaintiffs' mill were retarded or wholly suspended."

The parties agreed that if, upon the facts above stated, the action could be maintained, damages should be assessed by an auditor; otherwise, that a nonsuit should be entered. * * *

SHAW, C. J.: Every proprietor of land, through which a current of water flows, has a right to the use of it on his own land, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can make consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. 8 Metc. 476.

It appears by the facts stated in this case, that the defendants were proprietors of land and mills above those of the plaintiffs on the same stream; that having erected a new dam, which they had a right to do, they detained the water no longer than was necessary to raise their own head of water and fill their own pond. The court are of opinion that this was not an unreasonable use of the watercourse by the defendants, and that any loss, which the plaintiffs temporarily sustained by it, was *damnum absque injuria.*

Plaintiffs nonsuit.[2]

BULLARD *v.* THE SARATOGA VICTORY MANUFACTURING COMPANY

1879. COURT OF APPEALS OF THE STATE OF NEW YORK

77 N. Y. 525

This action was brought to restrain defendant from interfering with the natural flow of the waters of Fish creek, and to recover damages for such interference.

Defendant is the owner of a cotton mill situate upon said creek, known as "Victory Mill," run by water power from said creek. The dam creates a pond of about an acre in extent. Above this is a nat-

[2] See De Baun *v.* Bean, 29 Hun (N. Y.) 236; Gehlen *v.* Knorr, 101 Iowa 700, 70 N. W. 757, 36 L. R. A. 697, 63 Am. St. 416; Weare *v.* Chase, 93 Maine 264, 44 Atl. 900; Fisher *v.* Feige, 137 Cal. 39, 69 Pac. 618; Ferrea *v.* Knipe, 28 Cal. 340, 87 Am. Dec. 128.

ural obstruction in the stream, consisting of a ledge of rocks extending across it, and creating a natural pond. This ledge is known as "Marshall's Reefs." Still further up the stream is another similar ledge known as "Winne's Reefs." Defendant constructed canals around these reefs, regulating the flow of water through them, when in use, by gates. These canals and gates are only used in dry seasons, when the water in the stream is much below the ordinary stage.

The further facts appear in the opinion. * * *

ANDREWS, J.: The defendant by means of the canals which it has constructed around Marshall's and Winne's reefs, has made subservient to its use at the "Victory" mill in time of drought, a large quantity of water detained by the reefs in the stream above. By opening the gates in the canals in the morning, and closing them at night, it secures for the use of its mills during working hours, in addition to the natural flow of the stream, the water stored in the reservoirs, formed by the reefs, and is thereby enabled, during times of low water, with occasional exceptions, to operate its mills without interruption from lack of water, which it would be unable to do if compelled at such times to rely exclusively upon the natural flow of the stream. The reefs operate as natural dams and the defendant, by the use of the canals, derives the same advantage as if it had constructed dams at the reefs, of capacity sufficient to hold a quantity of water equal to that which may now be drawn through the canals from the reservoirs above. It is plain, however, that the defendant, by the manner of using its gates and canals, disturbs and interrupts the natural flow of the stream. It operates its mill by day only. By opening the gates during the day it draws upon the water stored above the reefs. It closes them at night and keeps them closed until morning, to allow the reservoirs to refill. But while the process of replenishing the reservoirs is going on, the natural flow of the stream below is arrested, and it is only after a sufficient time has elapsed to accumulate sufficient water to fill the reservoirs, that the water passes over the reefs and regains its normal flow.

The controversy in this case turns upon the right of the defendant thus to obstruct the natural flow of the waters of the creek. The plaintiff is the owner of a paper-mill situated a short distance below the defendant's mill, operated by the water drawn from the same stream and he derives through various grants, the right to the use of more than one-half of the waters of the creek. The plaintiff operates his mill day and night, Sundays excepted, according to the custom of paper mills, and it appears from the findings in the case that the manufacture of paper to be successfully and profitably conducted requires that a paper-mill should be operated continuously. The plaintiff's mill can be run to advantage by the use of 3,486 cubic feet of water per minute. Fish creek has an annual average flow of 20,000 cubic feet per minute, and the judge at Special Term finds

that during the lowest water that had been known in fifteen years prior to the trial, the natural flow exceeded 7,000 cubic feet per minute. It seems to follow as a necessary inference from the facts found, that if the flow of the creek was not interrupted by the acts of the defendant, the plaintiff would be enabled, under his grants, to operate the paper-mill continuously at all seasons of the year and in all stages of the water. It is only during times of low water, periods varying from four weeks to three months in each year, that the canals of the defendant are used. The machinery of the defendant's mill is adapted to the capacity of the stream in its ordinary stages or flow, and during nine months in the year, and in some years for much more than that time, the natural flow is adequate to propel the defendant's mill without the use of the canals. From the 13th day of May, 1870, when the plaintiff acquired title to the paper-mill, to the time of the commencement of the action on the 8th day of August, 1872, the paper-mill was stopped from want of water occasioned by the shutting of the gates 128 times, from which stoppages the plaintiff sustained damages to an amount exceeding $4,000. The court at Special Term found that the detention of the water by the defendant was for the sole purpose of enabling it to use the same to propel its machinery in its mill; that it had not unreasonably detained the same, and that its use of the stream was a reasonable use. Upon the facts found the court held and decided that the defendant had the right to detain, use and discharge the waters of the creek in the manner and for the purpose in which it did detain, use and discharge them, and directed judgment dismissing the complaint upon the merits.

The law governing the rights of riparian owners to the use of natural streams and water-courses upon their premises has become, by the increase of manufacturing establishments and the large investments of capital in hydraulic works, of great importance, and the questions arising out of the conflicting interests of different mill owners, upon the same stream, are frequently perplexing and difficult. The maxim *"Aqua currit et debet currere ut currere solebat"* prescribes the general rule in respect to running streams, but it is to be interpreted and applied in connection with another rule which is well settled, that each riparian owner has a right to a reasonable use of the water. But the right to a reasonable use being common to all the proprietors, it is often difficult to determine whether a particular use is consistent with this common right. Injury to one proprietor in consequence of the use of the water by another is not an invariable test of the right of such use. For instance, the use for domestic purposes, or for the watering of cattle, is permitted, although by reason of the small amount of water in the stream such use may be injurious to the proprietor below and he may thereby be deprived of water sufficient for similar purposes. The law allows an appropriation of the water for such uses by the owner of premises which are so situated as to give him the first opportunity to use the

stream, and this appropriation is not deemed to be an invasion of the common right. The question of reasonable use most frequently arises between mill owners on streams which afford a power available for the propulsion of machinery. The maxim that water should be allowed to flow, as it is wont to flow, if strictly construed and applied, would prevent the use of such streams for manufacturing purposes. The construction of dams to collect a head of water, and of sluices and canals to convey and discharge it, is necessary to the operation of mills propelled by the water of a stream. The use of these appliances necessarily, to a greater or less degree, disturbs and interrupts the natural flow of the current, and often injures the proprietors below. But the fact that injury is occasioned to other riparian owners from the construction and use of dams, is not, in this case, any more than in the case of injury by the abstraction of water for domestic uses, decisive upon the question whether such use is permissible. In Palmer *v.* Mulligan, 3 Caines 308, Spencer, J., said, that the erection of dams on all rivers was injurious in some degree to those who have mills on the same stream below, by withholding the water and by the greater evaporation in consequence of the increased surface, but that this was never thought to afford a ground of action." But dams may be constructed and used so as to interfere with the common right of riparian owners and subject the party maintaining them to an action. The party claiming the right to interrupt the natural flow of a water-course must show that such interruption is consistent with a reasonable exercise of his right as riparian owner. The question of reasonable use is ordinarily a question of fact to be determined upon a consideration of all the circumstances. Prentice *v.* Geiger, 74 N. Y. 341, September, 1878. "It is very difficult, and indeed impossible," says Parke, B., in Embury *v.* Owen, 6 Exch. 352, "to define, precisely, the limits which separate the reasonable and permitted use of the stream, from its wrongful application; but there is often no difficulty in deciding whether a particular use falls within the permitted use or not." There is no question upon the facts in this case that the manner of using the canals by the defendant is a serious injury to the plaintiff. The closing of the gates at night interrupts the flow of the stream and for a time prevents the use of the plaintiff's mill. But the case upon the facts found is brought within the doctrine declared by Shaw, Ch. J., in Gould *v.* The Boston Dry Dock Co., 13 Gray 443, which was approved by this court in Clinton *v.* Myers, 46 N. Y. 511. In the case last cited, Grover, J., referring to the case of Gould *v.* The Boston Dry Dock Co., says: "The doctrine of this case is, that a party has a right to erect a dam across a stream upon his land, and such machinery as the stream in its ordinary stages is adequate to propel; and if the stream in seasons of drought becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will en-

able him to use the water for the purpose of his machinery. I think this is the correct legal rule by which to determine the rights of riparian owners." There is no proof that the defendant detains the water wantonly or unnecessarily. Its machinery is adapted to the stream in its ordinary stages. The gates are only used in time of drought and for the sole purpose of supplying the water requisite to enable it, at such times, to operate its machinery. It is said that the defendant should not entirely close its gates, and that if the gates at night were managed so as to allow one-half of the stream to flow to the plaintiff's mill it would enable his mill to be run without interruption, while, at the same time, the part of the stream detained would fill the defendant's reservoirs before morning. The difficulty with this position is, that the proposition of fact upon which it is based is not found. On the contrary, the court refused to find it, and the evidence does not satisfactorily establish the fact in favor of the plaintiff. The original finding was, that when the canals are used it requires from three-quarters of an hour to three hours after the defendant closes the gates at night for the water to fill and overflow the defendant's dams, so as adequately to supply the plaintiff's mill, but at his request a special finding was made of the length of each of the stoppages of the plaintiff's mill in consequence of the closing of the defendant's gates, and it appears therefrom that nearly one-third of the stoppages continued nine hours or over, and one-half of them six hours or over. It is quite impossible, upon this state of facts, to say that if the gates were only partly closed the defendant's reservoirs would fill and the stream regain its normal flow before morning. The burden of proving this fact, if the plaintiff relied upon it as the ground of affirmative relief in the action, was, I think, upon him. The facts found establish the right of the defendant to fill its reservoirs at night, and it closed its gates for that purpose only. In view of the finding that the detention of the water was reasonable, it can not be assumed that it unnecessarily closed its gates, or that leaving them partly open would have secured the needed supply. If the fact had been found that a detention of a part of the water only, at night,—leaving sufficient to pass its gates to operate the plaintiff's mill,—would have secured the same advantage to the defendant as it derives from closing them entirely or if the fact was undisputed and should have been found, a different question would have been presented. But upon the case as it stands the plaintiff has failed to establish a right to equitable relief. * * *

The judgment should be affirmed.

All concur, except Rapallo, J., absent at argument, and Danforth, J., not in court at time of argument.

Judgment affirmed.[3]

[3] "One of the grounds of the plaintiff's complaint was, that when the water was very low, in time of drought, and the defendants detained it a few hours, or in one instance a whole day, to raise the water to a sufficient height

CLINTON *v.* MYERS

1871. COURT OF APPEALS OF THE STATE OF NEW YORK

46 N .Y. 511, 7 Am. Rep. 373

This action is brought to restrain defendant from opening the gate of plaintiff's dam, and letting off the accumulated waters.

At the village of Laurens, the plaintiff has a cotton factory, propelled by water power derived by means of daming, at the factory, a stream which takes its rise in a lake at a point three and a half miles distant; and is also the owner of the land forming the boundaries of the lake and at its outlet.

The lake is formed by springs that empty their waters therein, and by surface water during the rainy seasons, and from the melting of snows.

The defendant is the owner of a large farm between said lake and said factory, lying upon both sides of said stream, upon which is a water power and saw-mill, situate about half a mile below said lake.

In 1848, the grantors of plaintiff lowered the outlet of said lake seven feet below its original and natural position, and built a dam across said outlet seven feet higher than the level of such original outlet, making such dam, from the bottom of such deeper outlet to its top, fourteen feet in height.

A trunk and gate were placed in the bottom of such deeper outlet, and the same was used to save a large supply of water for the dry season; and in 1855, the plaintiff's grantors raised said dam four feet higher for the same purposes.

The dam has been used to restrain and detain the waters in said lake as a reservoir, during such portions of the year as the factory was adequately supplied with water from said stream, below said

to work their factory, it came to the plaintiff's mill faster than he could use it, and ran to waste over his dam. If it was so, it was because he had works not adapted to the entire or the best use of the stream; because his dam was too low, his reservoir not of sufficient capacity, or other cause, by which he was prevented from making the best use of the power of the water, when very low by reason of drought. If there was a loss of water at such times and from such cause, it was not one for which the defendants were responsible.

"As there was no detention of the water in ordinary stages of water, and no other detention of the water by the defendants, in times of extreme drought, than what was necessary to the reasonable use of their own mills, we are of opinion that it was not their duty, in point of law, to open their gates, or leave them open without using the amount to such extent as they might, merely because the plaintiff's works were of such a character that his necessities required such flow of the water. Judgment for the defendants."—Shaw, C. J., in Gould *v.* Boston Duck Co., 13 Gray (Mass.) 442, 453.

See Whaler *v.* Ahl, 29 Pa. St. 98; Dilling *v.* Murray, 6 Ind. 324, 63 Am. Dec. 385.

dam, and from its tributaries. When these sources failed to supply the necessary quantity of water, the deficiency was supplied from said reservoir in a steady and constant manner through the gate in the trunk, which is about a foot square.

The waters in and from said dam have been restrained and used, with the sole view of economizing and utilizing the same to the greatest possible extent, and in no case has said dam been used or controlled by plaintiff or his grantors viciously or in bad faith, with intent to injure, or in any way wrong the defendant or his grantors.

As said reservoir or lake has been maintained and used, it has been and is of great practical value and benefit to said defendant's power.

The defendant, in the fall of 1866, and in March, 1867, before the commencement of this action, went upon plaintiff's premises, without his permission, and raised the gate in said trunk of the dam, and let off and discharged from said lake a large quantity of water, which was wasted and lost to said plaintiff, because the same was not then needed for his said factory, whereby the plaintiff suffered damage in the sum of $100, and the defendant, at the same and at other times, threatened to open said gate and let off said waters whenever he pleased, and claimed the right to do so.

The court decided, as a matter of law, that plaintiff was entitled to an injunction restraining defendant, his agents and servants, from interfering with the plaintiff's said dams and water power, as prayed for in the complaint; and under that order judgment was entered. * * *

GROVER, J.: The judgment restraining the defendant, from interfering with the gate and other structures of the plaintiff at the outlet of the pond, can be sustained only in case the plaintiff has the right to maintain the dam and other structures, and thereby control the flow of the water in the manner and for the purposes found by the Special Term. * * * The judgment, in effect, determines, that the plaintiff has a right so to detain and use the water, it being necessary so to do, to give an adequate and profitable power to propel the machinery of a factory owned by him, situate about three miles below the outlet as against the defendant. The defendant is the owner of a parcel of land, situated upon both sides of the stream between the outlet and the plaintiff's factory, upon which there is a saw-mill operated by the defendant during portions of the year. The question to be determined is of great importance to the plaintiff, the case showing that his factory is of great value, which will be much impaired, if not wholly destroyed, by not enjoying the right to control and use the water in the manner claimed by him in this action. While this consideration should induce care in the examination of the case, it can have no weight in the determination of the legal rights of the parties. It is the duty of the court to apply the law as it is to the facts of every case, and give to every party his legal rights, irrespective of any hardship that may be thereby caused in any special

case. It is necessary to examine the question as to the rights of riparian owners, as the judgment for the plaintiff, to its full extent, depends wholly upon those rights. * * * How far the natural flow of the stream may be interfered with by a riparian owner, to enable such owner to utilize the stream for the purpose of propelling machinery, has frequently been the subject of judicial examination. Gould *v.* The Boston Duck Co., 13 Gray 443, may be regarded as a leading case upon this point. In this case the defendant had built a substantial dam upon the stream, and drew the water to its factory by means of a canal, and after using the same, returned it to its natural channel before it reached the plaintiff's land. The stream, at ordinary stages of water, afforded an ample supply for the defendants' factory; but in seasons of great drought the defendants were unable to operate their factory, during all the usual working hours of each day, but were obliged, in order to create the requisite head and supply of water, to shut their gates earlier than usual on some days, and sometimes for an entire day, and thus arrest the usual flow of the water. This was the injury complained of by the plaintiff, who was the owner of a mill upon the stream directly below the dam, and who was injured, to some extent by being deprived of the use of the water, while the natural flow was thus arrested. The court held that this use of the water by the defendant was not unreasonable, and that if such use did at times interfere with the use which the plaintiff might have made of the water it was *"damnum absque injuria."* The doctrine of this case simply is, that a party has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and if the stream in seasons of drought becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. I think this is the correct legal rule by which to determine the rights of riparian owners. This will enable each owner to make an advantageous use of the water. The machinery must be such as the power of the stream, in its ordinary stages, is adequate to propel. The water in times of drought, may be detained for such a length of time only, as is necessary to enable it to be advantageously and profitably used upon such machinery. If so used the accumulation will be discharged in quantities not beyond the usual flow of the stream. This will enable every owner in seasons of drought, when unable to use the water at all as then naturally flowing, to operate his machinery to some extent by obtaining the water so as to raise a proper head, and such quantity as to enable him to use the same. By so doing he is not liable to an action by an owner below, whose machinery does not require for its operation all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent injured by being deprived of the natural flow. But the machinery must be adapted to the power

of the stream at its usual stage. An owner has no right to erect machinery, requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by ponds full, discharging upon those below in unusual quantities, by means of which the latter are unable to use it. Merritt *v.* Brinkerhoff, 17 Johns. 306. In Pitts *v.* The Lancaster Mills, 13 Metc. 156, it was held, that an owner had a right to construct a dam and detain the water long enough to raise a head by filling it, permitting it then to resume its natural flow. In Brace *v.* Yale, 10 Allen 441, it was held, that the erection of a reservoir dam upon a small stream and thereby detaining and storing up the water until the owner of the dam desired to use it, and drawing from the pond and using it when he had occasion, was a user of the stream adverse to the rights of the owners below; and if continued for a sufficient length of time refined into a right. This, in effect, is an adjudication that an owner has not a right to create a reservoir and store the water therein for future use; and that by so doing he violates the rights of the owners below, for the preservation of which the law will afford a remedy. The plaintiff cites Hoy *v.* Sterrett, 2 Watts 327; Hetrich *v.* Deachler, 6 Pa. St. 32; and Hartzell *v.* Sill, 12 Pa. St. 248, as sustaining the right to store the water for future use claimed by the plaintiff. Hetrich *v.* Deachler simply holds, that the reasonableness of the detention of water by the owner above to the injury of the owner below, depending as it must on the nature and size of the stream as well as the business to which it was subservient, was a question of fact for the jury, it being impossible to make any general rule. Hoy *v.* Sterrett, so far as the questions involved have any bearing upon the present case, is the same as Hetrich *v.* Deachler. In Hartzell *v.* Sill, 12 Pa. St. 248, it was held, that the proprietor of a mill above had the right to detain the water long enough for the proper use of his mill; and if by so doing the owner below was injured, it was *"damnum absque injuria"*; and whether longer detained than necessary, was a question of fact for the jury. This is an entirely different question from that involved in the present case; that is, whether when the stream furnishes more water than is necessary to run a mill, the owner has a right, by means of a reservoir dam, to store up such surplus water and detain it until he shall want it for use in a dry season. Wheeler *v.* Ahl is in conflict with the law of this state. In this case the defendant had erected machinery, that the usual quantity of water in the stream was inadequate to propel. It was held that he might erect a dam, accumulate the water, and with such accumulation, run his machinery, discharging the water in unusual quantities upon the owner below. This is in direct conflict with Merritt *v.* Brinkerhoff, 17 Johns. 320. This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *aqua currit*, etc., supra. But it is insisted that this detention does no material injury to the defendant,

but that, on the contrary, his power is made more valuable by this use of the water. The answer to this is, that he must be the judge whether he will accept of any such benefit. He is entitled to the water and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer. Again, it is said, and the fact is so found by the Special Term, that the defendant insists upon his right to the natural flow of the water in the stream from a bad motive, and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to a party his legal right, because it disapproves his motives for insisting upon it. The use of the water by the plaintiff, to the extent awarded by the judgment, and protected by the injunction, has not continued twenty years. The plaintiff has acquired no right by prescription. Whether he has any such a right to detain the water by a five feet dam, as held by the court below, is a grave question upon the evidence; but, as its determination is not necessary, and as the evidence may be different upon another trial, I shall not examine or pass upon it. The counsel for the plaintiff cites from the opinion of Woodruff, J., in Corning *v.* The Troy Nail Factory, 40 N. Y. 220, the proposition that, if it was clear that the restoration of the water was of no value to the plaintiff, the case would not call for equitable interference. Assuming this to be correct, it has no application to the present case. It may be true, that equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law. But, interfering to restrain him from enforcing such a right, on the ground that it is of no value, is quite another affair. That is the present case. That equity will not restrain a party from enforcing his legal right, upon any such ground, is too clear for discussion. There was nothing in the evidence or findings, showing that the defendant was estopped from asserting his right to the natural flow of the water. The judgment appealed from must be reversed, and a new trial ordered; costs to be determined by the court in the decision of the case.

All concur, except Peckham, J., not voting.

Judgment reversed.

Section 2.—Domestic Use

SLACK *v.* MARSH

1875. COURT OF COMMON PLEAS OF CHESTER CO., PENNSYLVANIA

11 *Phila.* (*Pa.*) 543

This was an action of trespass to recover damages for the alleged wrongful deprivation of the plaintiff, by the defendants, of water from a certain stream, which the plaintiff claimed a right to receive and use. The case came before the court upon a special verdict, and

by agreement of counsel that the court should also determine the question of fact, whether the use by the defendants of the water in controversy was reasonable or otherwise under the facts found by the verdict. The jury, by their verdict, found that the plaintiff became in 1856 seized in fee of a tract of land in New Garden township, and has so continued seized until the present time; that for fifty years a certain stream has continued to run through the said premises, except that in dry weather, during the latter part of the summers of some years, the channel of this stream would sometimes become dry on the premises during at least a part of the day; that the water of this stream was sufficient at all ordinary times to furnish a full supply of water for the use of the plaintiff's family for culinary and domestic purposes; that this stream of water rose on the lands of the defendants several hundred yards north of the division line which separates certain of defendants' lands from the premises of the plaintiff, and after flowing through the defendants' lands enters the plaintiff's premises. They further found that, lately, and since the plaintiff became seized as aforesaid, the defendants erected dwelling-houses for the accommodation of two families on certain of their lands, between the head of said stream and the plaintiff's premises, and diverted the stream from the channel in which it had been accustomed to flow, at a point on other of their lands, and carried the same in pipes to the said houses, to be there used as a supply for domestic purposes and for one cow, and that the water so diverted has since been used up to the present time, reasonably and without unnecessary waste; but that by reason of this diversion the plaintiff was deprived of his usual supply of water for the use of his family to the extent of the water appropriated to the use of the defendants' dwelling-houses; that the stream is not of sufficient volume for several months of the year to supply water for the necessary uses of the dwelling-houses of both the plaintiff and defendants. They found further, that twelve or fifteen years ago the defendants' ancestor, under whom they claim, and who was then the owner of the lands of which they are now seized, by constructing drains on his land at the head of the said stream, increased the volume of the stream from thirty to fifty per cent. of the whole, which increase was equal to or greater in quantity than that used by the defendants at their said dwelling-houses, at the ordinary stage of the water; that all of the water, the original stream and the increase aforesaid, then passed down the original channel until as aforesaid diverted to the defendants' dwelling-houses, and that what remained thereof after use by them as aforesaid was returned to the original channel within their said lands, down which it left their premises; that the dwelling on the premises of the plaintiff was erected in 1866, and that no buildings were on the premises before that time, while the buildings of the defendants, to which the water was diverted, were erected a year or two thereafter. They also found that the premises of the defendants consisted of two tracts of land, on one of which

the said stream rises, and on the other of which the said two new dwelling-houses of defendants were erected; that the defendants' ancestor, under whom they claim, obtained his title to the former tract in 1835; and that the plaintiff purchased his premises from the same person, and by deed of the same date as the ancestor of the defendants purchased their said latter tract, on which the said two dwelling-houses have been erected. * * *

BUTLER, P. J.: The general principles governing riparian rights are well defined. Judge Story says: "The natural stream existing by the bounty of Providence for the benefit of the land through which it passes, is an incident annexed by law to the land itself." Tyler *v.* Wilkinson, 4 Mason, U. S. C. C. Rep. 397. Chancellor Kent says: "Every riparian proprietor has naturally an equal right to the use of the water. * * * He has no property in it, but a simple usufruct as it passes through his land, without diminution or alteration." 3 Kent's Com. 439. Still it is not literally accurate to say that the flow may not, under any circumstances, be altered or diminished; nor is the language quoted intended to be so understood. The upper owner may diminish it,—and where the stream is very small, even sensibly, and to the detriment of those below,—if the reasonable enjoyment of the water requires it. In Weston *v.* Alden, 8 Mass. 136, a large proportion of the flow was taken; and in Hoy *v.* Sterrett, 2 W. 332, and Hetrick *v.* Deichler, 6 Barr 32, almost the entire stream was detained for days together. Each proprietor is entitled to a reasonable use of the water, diminishing the flow only to such extent as is necessary to the use. What is a reasonable use depends upon the circumstances of each particular case, and the question is one of fact. The character of the stream, the purpose to which the water is applied, and the method of application, are important considerations in determining it. See Hoy *v.* Sterrett, and Hetrick *v.* Deichler, supra; Wardsworth *v.* Tillotson, 15 Conn. 36.

Here the parties have submitted the question to the court—before entering upon it we should say that we do not consider the rights of the parties affected by the increase made in the volume of the stream. This increase might have been applied to the defendants' exclusive use before it reached the stream. But after it did so, his exclusive rights were gone. This distinction is very clearly drawn in Wood *v.* Wand, 3 Exch. Rep. 746, cited by the defendants' counsel.

Nor, on the other hand, do we think the rights of the parties are affected by the circumstance that the ground on which the defendants' building stands was once separated from the larger tract bordering the stream. While thus separated the owner was cut off from the water, but when reunited the original right again attached and became available. It is true that the water had never before been applied at this point. But as no adverse right had been acquired below, this is unimportant. The plaintiff's application of the water is also new. There is the same right to the use at the one point as at the other.

Then, is the defendants' use, as described by the verdict, *reasonable?* The water is applied to domestic purposes only. Are the means employed to obtain it objectionable? We do not think so. They are the only means by which it can be advantageously taken. To confine the defendants to dipping from the stream, would deprive them of all advantage from the water. There is no waste from the pipes; the verdict settles this. All passes down the channel, saving only what is consumed. Is there unreasonableness in the quantity taken? The stream is weak, and at certain seasons disappears after running a few hundred yards from its source. At such times the defendants' consumption exhausts what reaches them. But we can not pronounce this unreasonable. On such a stream each successive owner may consume what his ordinary domestic wants require. No other rule would be reasonable; no other could be applied. The supply being insufficient for the successive owners, how otherwise would the limit of each be gauged? How much might the first take, and how much the second; how much the defendants here as against the plaintiff; and how much the plaintiff as against those below? Let each take the smallest possible quantity that may be suggested, and still others below will get none. Such a rule, if practicable, would benefit nobody; the water would be virtually lost to all. The only rule that can be applied to the facts before us, is that which limits the use to the owner's ordinary necessities. But here are two families on this land. Is it unreasonable to take a supply for both? We can not say it is. The creation of an extraordinary demand, as by the erection of a town, would present a different case, of which we need not speak. But we can not pronounce a supply for two families on this land unreasonable—extraordinary. The reasons for this are obvious (such supply may not exceed the necessities of one ordinary family; two dwellings are not unusual on such a tract) and we need not remark upon them.

This conclusion requires that judgment be entered for the defendants.

The case of Wardsworth *v.* Tillotson, 15 Conn. 36, supra, is in principle, and in some of its facts, much like the one before us.

EVANS *v.* MERRIWEATHER

1842. SUPREME COURT OF ILLINOIS

3 *Scam.* (*Ill.*) 492, 38 *Am. Dec.* 106

LOCKWOOD, Justice, delivered the opinion of the court:

This was an action on the case, brought in the Greene Circuit Court, by Merriweather against Evans, for obstructing and diverting a water-course. The plaintiff obtained a verdict, and judgment was rendered thereon. On the trial the defendant excepted to the

instructions asked for and given, at the instance of the plaintiff. The defendant also excepted, because instructions that were asked by him, were refused. After the cause was brought into this court, the parties agreed upon the following statement of facts, as having been proved on the trial, to wit: "It is agreed between the parties to this suit, that the following is the statement of facts proved at the trial in this case, and that the same shall be considered as part of the record by the court, in the adjudication of this cause. Smith and Baker, in 1834, bought of T. Carlin six acres of land, through which a branch run, and erected a steam mill thereon. They depended upon a well and the branch for water in running their engine. About one or two years afterwards, John Evans bought of T. Carlin six acres of land, on the same branch, above and immediately adjoining the lot owned by Smith & Baker, and erected thereon a steam mill, depending upon a well and the branch for water in running his engine.

"Smith & Baker, after the erection of Evans' mill, in 1836 or 1837, sold the mill and appurtenances to Merriweather, for about $8,000. Evans' mill was supposed to be worth $12,000. Ordinarily there was an abundance of water for both mills; but in the fall of 1837, there being a drought, the branch failed, so far that it did not afford water sufficient to run the upper mill continually. Evans directed his hands not to stop, or divert the water, in the branch; but one of them employed about the mill did make a dam across the branch, just below Evans' mill, and thereby diverted all the water in the branch into Evans' well. Evans was at home, half a mile from the mill, and was frequently about his mill, and evidence was introduced conducing to prove that he might have known that the water of the branch was diverted into his well. After the diversion of the water into Evans' well, as aforesaid, the branch went dry below, and Merriweather's mill could not and did not run, in consequence of it, more than one day in a week, and was then supplied with water from his well. Merriweather then brought this suit, in three or four weeks after the putting of the dam across the branch for the diversion of the water, and obtained a verdict for $150. This suit, it is admitted, is the first between the parties litigating the right as to the use of the water. It is further agreed, that the branch afforded usually sufficient water for the supply of both mills, without materially affecting the size of the current, though the branch was not depended upon exclusively for that purpose. Furthermore, that at the time of the grievances complained of by the plaintiff below, the defendant had water hauled in part for the supply of his boilers. That the dam was made below the defendant's well, across the branch, which diverted as well the water hauled and poured out into the branch above the well, as the water of the branch, into the defendant's well.

"HARDIN & LOGAN,
for Merriweather.
"SHIELDS & SMITH,
for Evans."

Upon this state of facts, the question is presented, as to what extent riparian proprietors, upon a stream not navigable, can use the water of such stream? The branch mentioned in the agreed statement of facts, is a small natural stream of water, not furnishing, at all seasons of the year, a supply of water sufficient for both mills. There are no facts in the case showing that the water is wanted for any other than milling purposes, and for those purposes to be converted into steam, and thus entirely consumed. * * *

Each riparian proprietor is bound to make such a use of running water, as to do as little injury to those below him, as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now the question fairly arises, is that a reasonable use of running water by the upper proprietor, by which the fluid itself is entirely consumed? To answer this question satisfactorily, it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied, in order to his existence. Artificial, such only, as by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish.

The supply of man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and can not, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but can not be considered absolutely necessary to his existence; nor need the machinery which he employs be set in motion by steam.

From these premises would result this conclusion: that an individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far, then, as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water

to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But where the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream, to carry on his manufacturing purposes, how shall the water be divided? We have seen that, without a contract or grant, neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion.

It appears, from the facts agreed on, that Evans obstructed the water by a dam, and diverted the whole into his well. This diversion, according to all the cases, both English and American, was clearly illegal. For this diversion, an action will lie. It, however, was contended that Evans forbade the construction of the dam, by which the water was diverted into his well. If a servant do an act against the consent of the master, the latter is not liable. In this case, however, a jury might fairly infer from the fact, that as Evans lived near the mill, and was frequently at it, he must have been conversant with the manner in which his mill was supplied with water, and that he either countermanded the instructions, or acquiesced in the construction of the dam, after it was erected. Having availed himself of the illegal act of his servant, the law presumes he authorized it. Having arrived at the conclusion that an action will lie in behalf of Merriweather against Evans, for obstructing and diverting the water-course mentioned in the plaintiff's declaration, I have not deemed it necessary to examine the instructions given by the court, to see if they accord with the principles above laid down. Having decided that the plaintiff below has a right to recover on the facts, whether the instructions were right or wrong would not vary that result. It is possible that if the true principles which govern this action had been correctly given to the jury, the damages might have been either less or more than the jury have given; but in this case, as the damages are small, the court ought not, where justice has upon the whole been done, to send the case back, to see if a jury, upon another trial, would not give less.

For these reasons I am of opinion that the judgment ought to be affirmed, with costs.

Judgment affirmed.

MASTENBROOK *v.* ALGER

1896. SUPREME COURT OF MICHIGAN

110 *Mich.* 414, 68 *N. W.* 213

MOORE, J.: Complainant filed a bill, as the lower proprietor of land, alleging that the defendant, who was an upper proprietor, had constructed a dam across a water way which runs through complainant's land, the effect of which was to divert the water from its natural channel onto defendant's land, where it is wholly absorbed, and that none of the water is allowed to come to the land of the complainant. The bill contained no allegation of damages, but it did aver that complainant has no other running water on his farm for his stock; that the stream of water runs near his house and barns, and is of great benefit to him for his natural purposes; that he has the equitable right to have the water flow across and upon his land; that he has suffered damages, and has been deprived of the equitable right to the use of the water by defendant; and that he is remediless at law. The defendant admits that he constructed a dam on his land, but denies that the dam prevents the flow of any water to the lower proprietor, but claims that one-half of it was allowed to flow to the lower proprietor. He claims that his dam was in substantially the same place as was a dam erected in 1852 or 1853, and which had been maintained long enough to give him a prescriptive right to maintain it; that one-half of the stream was diverted by the erection of the dam in 1852 or 1853; and that he now has the right to divert one-half of the waters of said stream, and use them for irrigation or any other purpose. There was a large amount of testimony taken in the case, and Judge Adsit made a decree in which he found that the complainant was entitled to have the stream of water flow across his land for domestic purposes and stock, except as said stream may be lessened by the use by defendant of water for domestic purposes and stock. He further found that the volume of water furnished by said stream is barely sufficient to sustain the stock of complainant, defendant, and other riparian proprietors along the stream, with water for their natural wants, and for domestic use, and that there is not a sufficient volume of water, so that the defendant can use any part thereof in the irrigation of his land. He found that the defendant had obstructed the flow of water in said stream, and used it for the purpose of irrigation, and that the appropriation of water by the defendant was contrary to the rights of complainant. He made a decree perpetually enjoining the defendant from appropriating any of the water to the purposes of irrigation, and from using the water for any other than ordinary purposes, in supplying the natural wants of the defendant, including the use of the water for domestic purposes in connection with his home, and

the use of his farm. He also made in the decree a direction that the defendant forthwith remove any and all dams and obstructions made or maintained by him upon his land, or from interfering with, obstructing, or perverting the flow of said stream upon said lands of complainant, except as above stated. From that decree the defendant appeals.

It is claimed by defendant that, inasmuch as there is no allegation in complainant's bill that he is damaged to the amount of $100, the bill did not confer jurisdiction on the court, and should have been dismissed. We do not think this contention can be sustained. Rowland *v.* Doty, Har. (Mich.) 3; White *v.* Forbes, Walk. (Mich.) 112.

Something more than 500 pages of testimony was taken in the case. It would not be profitable to make an analysis of it here. A careful examination of the testimony shows that the decree of the learned judge was warranted by the facts shown, except in one particular. The record discloses that in 1852 or 1853 a dam was put across this stream, on the premises of defendant, for the purpose of diverting a portion of the stream to the house and barns occupied by the then proprietor, for the purpose of supplying the natural wants of the proprietor, including the use of the water for domestic purposes and for stock, in connection with his home and farm. This dam was maintained, either at that place or at another, suffciently long, so that a prescriptive right is acquired to maintain it for the purpose of furnishing a supply of water for domestic purposes. The use of the water by defendant for purposes of irrigation is entirely unwarranted. It is not until very recently that an attempt has been made to use the water for that purpose. In view of the fact that this dam was maintained so long for the purposes of conveying water to the house and barns of defendant, which is a great convenience to him, and the effect of removing the dam would do away with that valuable right, and compel the defendant to carry water a long distance, we think the decree ought to be modified in that particular. The defendant should be allowed to have the use of so much of the water in said stream as shall be necessary for ordinary purposes in supplying his natural wants, including the use of the water for domestic purposes and for stock, in connection with his home and farm, and for no other purpose; and he ought to be allowed to maintain such a dam or obstruction in said stream as would enable him to convey the water to his house and barns in sufficient quantities for said purposes, and for no other purpose. The decree is modified to this extent, and affirmed in all other particulars; complainant to have costs in lower court. Neither party to have costs here.

Grant, J., did not sit. The other justices concurred.

FILBERT *v.* DECHERT

1903. SUPERIOR COURT OF PENNSYLVANIA

22 Pa. Super. Ct. 362

Opinion by W. D. PORTER, J., March 12, 1903:

The plaintiff is the owner in fee of a tract of land through which flows Furnace creek, an unnavigable stream, upon which is erected a gristmill and sawmill operated by the water power. The corporation defendant is an agent of the state to which has been committed the possession and management of the property used as an asylum for the chronic insane, the title to the property being in the commonwealth: Act of June 22, 1891, P. L. 379. The land of which the defendant, as the representative of the commonwealth, is in lawful possession consists of a tract containing 540 acres, through which for a distance of about a mile flows Asylum creek, a stream which falls into Furnace creek, at a point above the land of the plaintiff. The state has erected upon its land extensive buildings, suitable as a place of residence for the insane, and has for a number of years there maintained the unfortunate of this class to the number of 800, the nurses and officers necessarily employed about the buildings increasing the total population living upon the land to about 900. Asylum creek enters the property of the defendant at a point nearly 100 feet higher than the asylum buildings, and the water used about the buildings has been conveyed from the creek through a six-inch pipe. The plaintiff brought this action alleging a deprivation of her right to the use of the water of said stream. The only injury to the property of the plaintiff suggested by the evidence was the diminution of the water power.

The riparian rights of the commonwealth are the same which would have been incidental to ownership by a private individual: Union Mill, etc., Co. *v.* Ferris, 2 Sawyer 176. The defendant as the agent of the commonwealth in possession and control of the property possessed the same rights. The right of an upper riparian owner to divert the water of a stream for manufacturing or other purposes having no necessary relation to the use of his land, is limited as between himself and a lower proprietor to so much of the water as will not materially or sensibly diminish its quantity: Haupt's Appeal, 125 Pa. St. 211; Pennsylvania Railroad Company *v.* Miller, 112 Pa. St. 34; Clark *v.* Pennsylvania Railroad Company, 145 Pa. St. 438; Phila., etc., Railroad Company *v.* Pottsville Water Company, 182 Pa. St. 418; Miller *v.* Miller, 9 Pa. St. 74; Wheatley *v.* Chrisman, 24 Pa. St. 298. Title to land does not give an absolute right to the water which flows over it; the owner has a right to the reasonable use of the water in connection with his lands which are riparian, but he can not convey it to a detached tract: Lord *v.* Mead-

ville Water Company, 135 Pa. St. 122. "Every riparian owner has the right to use the water of the stream passing over his land for ordinary domestic purposes; and if the stream be so small that his cattle drink it all up, while it may be a loss to the lower riparian owner, it is *damnum absque injuria.*" Pennsylvania Railroad Co. *v.* Miller, 112 Pa. St. 34; Mayor *v.* Commissioners, 7 Pa. St. 348; Philadelphia *v.* Gilmartin, 71 Pa. St. 140; Philadelphia *v.* Collins, 68 Pa. St. 106; Gallagher *v.* Philadelphia, 4 Pa. Super. Ct. 60; Slack *v.* Marsh, 11 Philadelphia 543. The learned judge of the court below charged the jury that the use of the water made by the defendant was not a proper use of the stream by a riparian owner; and that "if the amount of water taken from the channel of this stream sensibly or materially diminished the flow, then the defendant has subjected itself to an action for an excessive use or diversion of the water." "No matter what the necessities of the asylum may have been, no matter how useful the institution may be, how praiseworthy it may be, it had no right to convey the water out of its course to the prejudice of the plaintiff's right." This language has the merit of being free from ambiguity. The learned judge of the court below determined as matter of law that the defendant had no right to furnish to the inmates of the buildings upon the riparian land water for drinking, culinary and cleansing or any other purpose usually considered necessary to the preservation of life and health.

This conclusion seems to have been reached because of the frequent recurrence of the term "ordinary domestic purposes" in the authorities dealing with the rights of riparian owners. The learned judge, in his opinion refusing a new trial, says: "The principal question is whether the use of the water by the defendant is domestic in its nature." He then refers to the definitions of the word "domestic" found in several dictionaries, and thus states the result: "The central idea of both these definitions seems to be a family, home interests, something for the benefit of the family and home." Having thus reasoned out that there must be a home and a family upon the land before riparian rights become incidental to it, the learned judge proceeds to investigate the character of the residence of the insane patients upon the property of the state. Having satisfied himself that this public institution "is an asylum, not a home; a house of detention; a place of treatment for the chronic insane, a hospital," the process of excluding these dwellers upon the margin of the stream from all riparian rights is complete. Even if the spirit of a legal principle and the relations out of which it arises are to be disregarded, the meaning of the word "domestic" can not be arbitrarily assumed to be always thus narrow. One of the declared purposes of ordaining the Constitution of the United States was to "insure domestic tranquility." As here used the term can hardly be said to imply an intention to preserve the peace of private families; it refers rather to the regulation of internal public affairs, not foreign interests. The term ordinarily means pertaining to one's place

of residence, or to the affairs which concern it, or used in the conduct of such affairs. The authorities do not leave us without a definition of the term. In Philadelphia *v.* Gilmartin, supra, Mr. Justice Agnew said, in referring to the use of water for manufacturing purposes: "These uses are not domestic, that is, such as are for the preservation of the life and health of the population and their creatures." Chief Justice Paxson said, in Haupt's Appeal, supra: "If there was a tenant thereon he could use it for watering his stock and for household purposes, for any useful, necessary and proper purpose incident to the land itself and essential to its enjoyment." And again, in discussing the rights of the public in a private stream: "In such a case no one can use it or take the water except at a public crossing. There the traveler may stop, refresh himself and water his horse; the water has no owner and he impairs no man's right. But except at public crossings, such as a road or a street, no one but a riparian owner can use the water; not because the latter has any ownership in it, but because the stranger has no right of access to it. * * * It follows from what has been said that the dwellers in towns or villages watered by a stream may use the water as well as the riparian owner, provided they have access to the stream by means of a public highway." Mr. Justice Thompson, in Philadelphia *v.* Collins, supra, thus defines this right: "Every individual residing upon the banks of a stream has the right to the use of the water to drink and for the ordinary uses of domestic life; and where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right, but of course in a greatly exaggerated degree." The language of Chief Justice Gibson, in Mayor *v.* Commissioners, supra, is to the same effect, and he speaks of the right as a "natural and inherent" one. The word as used in the authorities cited by the learned judge of the court below refers to the purposes for which the inhabitants may use the water, and not to the social status of the individuals occupying the buildings which may be upon the land. The right is a natural one, recognized as growing out of the natural wants of man; it is inherent in the ownership of the land, and is to be enjoyed by all who lawfully dwell upon the premises to the ownership of which it is an incident, without regard to the duration or purpose of such residence. All those who lawfully occupy the riparian lands have a right to the ordinary use of the water for the purpose of supplying their natural wants, including drinking, washing, cooking, and about their habitations for such things as are necessary to the preservation of life and health. This natural right is not dependent upon whether the dwellers by the stream occupy homes or hospitals, are sheltered by tents or live in the open. The state might lawfully ordain that the National Guard should encamp upon this tract of land and take water for their use, while there, from this stream. The ordinary use of the water, for the purpose of supplying the natural wants of those who inhabit the riparian lands, may involve an exhaustion of

the stream without incurring liability to lower riparian proprietors. Attorney General *v.* Gt. Eastern Ry. Co., 23 L. T. N. S. 344. When the use is extraordinary, for the supply of artificial wants, such as manufactures, those whose supply of water is thereby sensibly diminished, have a right of action. Gould on Waters (3d ed.), sec. 205; Black's Pomeroy on Water Rights, secs. 138, 140, and cases there cited.

This agent of the state, the defendant, had an unquestionable right to take from the stream so much water as was reasonably necessary to supply the natural wants of those living upon this tract of land. The evidence does not indicate any necessity for the use of the water to operate a fountain. The defendant was not warranted in taking water for the manufacture of ice to be sold away from the premises. The first and second specifications of error are sustained.

The witness, Henry H. Miller, having been permitted by the court to testify that the supply of water at the plaintiff's mill was diminished about the time of the erection and occupancy of the defendant's buildings, and that the rental value of the mill was thereby decreased, it was competent for the defendant to ask him on cross-examination any question which tended to throw light upon the knowledge which witness had of the facts, or show the conditions which had resulted in the diminution of the supply of water, and whether the defendant was responsible for those conditions. The sixth specification of error is sustained.

The judgment is reversed and a *venire facias de novo* awarded.[4]

Section 3.—Irrigation

WESTON *v.* ALDEN

1811. SUPREME JUDICIAL COURT OF MASSACHUSETTS

8 *Mass.* 136

This was a special action of the case against the defendant for diverting an ancient water-course which passed through the plaintiff's close, and by which it was fertilized, so as to produce annually a large crop of grass.

The cause was tried before the chief justice, upon the general issue, at an adjournment of the last October term in this county, and a verdict found for the plaintiff, by the consent of the parties, subject to the opinion of the court upon the following report of the judge who sat at the trial.

It was proved that there was an ancient brook of running water,

[4] See Salem Flouring Mills Co. *v.* Lord, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832; Canton *v.* Shock, 66 Ohio St. 19, 63 N. E. 600, 58 L. R. A. 637, 90 Am. St. 557; Sparks Mfg. Co. *v.* Newton, 57 N. J. Eq. 367, 41 Atl. 385; Barre Water Co. *v.* Carnes, 65 Vt. 626, 27 Atl. 609, 21 L. R. A. 769, 36 Am. St. 891.

as described in the declaration; and that the plaintiff was seised of the close therein mentioned; and that this water-course first passed by the defendant's meadow, which was bounded on it; that in its natural course it passed by several meadows belonging to persons not parties to the action, and then passed by the plaintiff's meadow, as alleged in his declaration; that the defendant, claiming a right to divert the water for any purpose as he pleased, in fact cut several sluices in the bank of the water-course, in his own land, that he might, with the water passing through those sluices, irrigate his own meadow; that the water thereby passed on to the defendant's meadow through those sluices, but afterwards passed into the same brook above the plaintiff's meadow, except such part as was absorbed in the defendant's meadow, or evaporated; and that so much of the water was absorbed in the defendant's meadow, or evaporated, in consequence of the sluices so opened by him, that less water than usual came to the plaintiff's meadow, by reason of which his said meadow was greatly damaged, the quantity of grass produced thereon being materially diminished.

If, upon these facts, the defendant had a legal right to divert the water from the said ancient water-course, for the purpose and in the manner aforesaid, the verdict was to be set aside, and a new trial granted; otherwise the verdict was to stand, and judgment to be entered accordingly.

The action was continued nisi for the opinion of the court upon the foregoing report; and at an adjourned session of the last March term in Suffolk, present the Chief Justice, and Sewall and Parker, Justices, the opinion of the court was pronounced to the following effect:

We think, upon the facts reported in this case, that the plaintiff has no right of action, and that the verdict must be set aside. A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this, either by dipping water from the brook, and pouring it upon his land, or by making small sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuria*.

New trial granted.

GILLETT *v.* JOHNSON

1861. SUPREME COURT OF ERRORS OF CONNECTICUT

30 *Conn.* 180

Action on the case, for the diversion of a stream of water, tried in the superior court on the general issue, closed to the court, before Seymour, J.

On the trial it appeared that the plaintiff owned the premises described as his in the declaration, and that the defendant owned an adjoining close, and that on the defendant's premises was a spring, the waters of which, before the diversion complained of, had, from time immemorial, found their way to the premises of the plaintiff, and furnished him with a convenient watering place for his cattle. As measured by the course of the water, the spring was about sixteen rods from the dividing line of the parties. The watering place was in the plaintiff's close, near the dividing line. The spring usually furnished an amount of water that would require a half-inch pipe to carry it off; the supply being constant, and nearly uniform, except that in very dry years it failed to run. For the distance of about six or eight rods the water descended rapidly, in a well-defined course between abrupt banks; it then came to marshy ground, where the descent was slight, and the water was spread so that its flow during the summer months was slight, not sufficient to prevent grass from growing along its course, nor sufficient to break the turf of grass, but generally sufficient to form a continuous sluggish current along the surface, in a natural and defined bed or depression, to the plaintiff's watering place; and, except in very dry seasons, the watering place was amply supplied with water from the spring, either directly by the current, or indirectly and imperceptibly through the marshy ground. The defendant had made a dam on her own land, across the current, about six rods below the spring, and by means of the dam and of ditches she had turned the water for purposes of irrigation on to her own land, where the water was absorbed; and the plaintiff was thereby deprived of it, so as to lose the benefit of his watering place. The defendant applied the water to a useful and beneficial purpose, and the manner of the application was prudent and husbandlike. The plaintiff had no other convenient place on his close for watering cattle. The defendant claimed that no action would lie upon these facts for the alleged diversion, for that she had a right to the use of the water of the spring for irrigating her land. She also claimed that the facts did not show the existence of any water-course from the spring to the plaintiff's premises, because, as she claimed, the elements which, in point of law, constitute a water-course, were wanting.

The court decided adversely to the claims of the defenndant, and rendered judgment for the plaintiff, and the defendant thereupon moved for a new trial. * * *

BUTLER, J.: The facts detailed in this motion do not show that any injustice was done to the defendant by the decision of the court below. It clearly appears that a water-course existed from the spring to the premises of the plaintiff, which had been immemorially and beneficially used by him for watering his cattle. It was a small but constant stream, failing only when all or nearly all such small streams fail, by reason of drought; running rapidly in a well-defined course between abrupt banks, where the fall was considerable; and

sluggishly but continuously in a natural and defined bed, where the fall was less; and it had in these respects the characteristics observed, to a greater or less extent, in all such small streams. The quantity of water was also considerable to be furnished by a single spring, and it required a dam and ditches to divert it on to the defendant's land, and when so diverted it served a useful and valuable purpose. These facts are sufficient to show that a water-course, valuable to both plaintiff and defendant, existed.

The right of the defendant to use the stream for purposes of irrigation can not be questioned. But it was a limited right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. It was not enough that the defendant applied the water to a useful and proper purpose, and in a prudent and husbandlike manner. She was also bound to apply it in such a *reasonable manner and quantity* as not to deprive the plaintiff of a sufficient supply for his cattle. This principle was fully discussed and recognized by this court in Wadsworth *v.* Tillotson, 15 Conn. 377, and the earlier cases there cited, and a new or extended examination of the authorities is unnecessary. The claim of the defendant was that she had a right to divert the whole for the purpose of irrigation, regardless of the rights and necessities of the plaintiff, and she did so divert it. Such diversion under the circumstances was clearly unreasonable and therefore illegal, and the court correctly rendered judgment for the plaintiff.

A new trial should be denied.

In this opinion the other judges concurred.

GOULD *v.* STAFFORD

1888. SUPREME COURT OF CALIFORNIA

77 Cal. 66, 18 Pac. 879

MCFARLAND, J.: The judgment will have to be reversed because the findings are insufficient. They are not pointed and specific on the issues presented, some of them are contradictory of each other, and some of them are in conflict with the admissions of the pleadings. As there will probably be another trial of the case, it is proper to notice some of the questions which the court below will again have to consider. Plaintiff is the owner of land on a natural stream of water called "Montecito creek," and this action is brought to enjoin defendant, an upper riparian proprietor, from diverting water from a main branch of said creek, called "Cold Spring branch," at a point a short distance above plaintiff's land, and to recover damages for the diversion.

* * * * * * * * * * * *

Assuming that in this state an upper riparian proprietor has the right to use a reasonable amount of the water of a natural stream running through his premises for irrigating his riparian land, still he has not the right, for that purpose, to take all the water which flows in the stream at the point where he diverts it; and, if the defendant did (as the evidence tends to show) thus take all the water flowing at the point where it was diverted, his act in so doing was wrongful. What would be a reasonable amount of water for irrigation is a question that must depend upon the particular circumstances of each case in which it arises, and it is a question which will often be of difficult solution; but it is clear that in no case can he, for that purpose, as against a lower proprietor, use all the water of the stream. That could be done, if at all, only where the whole of the water was absolutely necessary for strictly domestic purposes, and to furnish drink for man and beast.

Whatever may be the right of an upper proprietor to use a part of the water of the stream to irrigate his riparian land, he has no right to take any of it away to other lands not riparian, which seems to have been done by defendant in this case. Moreover, he must see to it that the surplus after use be returned to the stream, which it appears was not done in this case.

* * * * * * * * * * * *

The judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.[5]

We concur: Searls, C. J.; Thornton, J.; Sharpstein, J.; McKinstry, J.

Patterson, J.: I concur in the judgment.

SAMPSON *v.* HODDINOTT

1857. ENGLAND. COURT OF COMMON PLEAS

1 *C. B.* (*N. S.*) 590

CRESSWELL, J., now delivered the judgment of the court.

In this case, several causes of complaint were brought forward on behalf of the plaintiff,—first, in respect of the diversion of the river Yeo,—secondly, in respect of the diversion of a stream called the Back Water,—thirdly, in respect of the obstruction and diversion of a stream called the Silver Lake Spring.

In the course of the argument, the court decided all the points that were raised in respect of the two latter causes of complaint, in favour of the defendant; but they took time to consider the question arising on the first.

The result of the facts as to this part of the case appears to us to be as follows, viz., that the plaintiff had immemorially enjoyed the

[5] See Shotwell *v.* Dodge, 8 Wash. 337, 36 Pac. 254; Embrey *v.* Owen, 6 Exch. 353.

benefit of irrigating certain of his meadows with the water of the river Yeo, subject, however, to the right of the miller at West Mill to detain the water for the use of his mill. Although the natural flow of the river was prevented by the exercise of this right, yet the water was allowed to come down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant, for the purpose of irrigating his own adjacent land, had from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows: and, although the facts stated in the special case do not, in our opinion, lead to any certain conclusion, that, by the mere irrigation on the part of the defendant, the quantity of water which ultimately reached the plaintiff's meadows was sensibly diminished, yet the effect was, that the water was detained, by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully.

The question is, whether such a diversion and detaining of the water by the defendant is actionable.

It was contended, on his part, that it was not, because he had a right by law, as a riparian proprietor, to apply the water of the stream to irrigate his adjacent land, provided he did so (as it was admitted he did) in a careful and proper manner.

* * * * * * * * * * * *

The question between the parties is thus reduced to this single point,—has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that?

The general principle of law which, in our opinion, may be deduced from the decision of Embrey *v.* Owen, 6 Exch. 353, and the authorities cited by Parke, B., in delivering judgment in that case, is, that every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream.

In the present case, it appears to us, on the evidence, that the detention by the defendant, under the circumstances, of the water of the river Yeo for the purposes of irrigation, was a use of it which in its character, was necessarily injurious to the natural rights of the plaintiff as the proprietor of land lower down the stream. The effect was obviously the same as if the defendant had placed a bar or weir across the river, and by that means had wholly prevented its natural course for a certain number of hours. And it appears to us that there is neither authority nor principle for contending that such an act can be justified on the ground that it was done for the purpose of improving the adjacent land of the defendant, whether by irrigation or otherwise.

For these reasons, we are of opinion that our judgment must be for the plaintiff as to such part of his complaint as relates to the river Yeo, and, as to the rest of the alleged causes of action, for the defendant. Judgment accordingly.

MILLER *v.* MILLER

1848. SUPREME COURT OF PENNSYLVANIA

9 Pa. St. 74, 49 Am. Dec. 545

In error from the Common Pleas of Union.

August 1. Case for a nuisance in diverting a stream of water. The evidence was that defendant, being the owner of certain land upon a stream, conveyed a part lying farthest down the stream to plaintiff, without a special reservation of the right to the water. He then opened ditches on his land, and turned the water into them for the purposes of irrigation.

WILSON, P. J., told the jury, "A man may use the water for the purpose of watering his meadows, provided he so constructs his races, or the ground is so situated, that any surplus will return again into the natural channel before it reaches the occupant below him, and provided the flow of water which the occupant below was previously entitled to the use of, is not materially diminished; where he goes beyond this, even for watering his meadows, he must retain the right to do so from the occupants on the stream below, or he subjects himself to a suit for damages, although the damages be small; whether a stream is materially diminished, so as to subject the occupier who diminished it to damages, must in some measure depend on the capacity of the stream: when the stream is so large as to come under the denomination of a creek or river, a large quantity may be used for irrigating land, without any appreciable diminution of the quantity, and no one injured, or have a cause of action against the person lessening the quantity. But when the stream is so small that the quantity taken for irrigation perceptibly and materially diminishes it, the person affected by it will have cause of action, *and the question does not turn on whether the occupier below who complains, has sufficient water left for his domestic purposes, or more than he was previously using from the stream, but whether the quantity flowing on to his land, which he had a right to use, has been materially lessened or diminished.*"

* * * * * * * * * * * *

BELL, J.: As the evidence given on the trial is not brought up with the record, we are unable to ascertain the precise extent of the diversion of the water in question, or of its use by the defendant. Nor is this, perhaps, necessary to enable us to decide understandingly the principal point presented on the argument. It is not whether the owner above has a right to use the water flowing through his lands for the purposes of irrigation, but whether he is bound so to use it as not materially to diminish the quantity which before flowed over and across the land of the occupier below.

The general rule on this subject is, that any proprietor of lands on the banks of a river or other stream, has an equal right to use the water which flows adjacent to his property; but, without the assent of the adjoining proprietors, he can not divert it or diminish the quantity of water which would otherwise descend to the proprietors below. The law requires of the party that he should use the stream in a reasonable manner; and one of the conditions of this use is, that he do not destroy or render useless, or materially lessen or affect the application of the water by those situated above or below him on the stream. The general doctrine will be found thus stated by most of the best writers on this subject, in whose treatises are collected the numerous cases which might be cited in support of it. Of these, it will be unnecessary to notice more than one or two. In Wright *v.* Howard, 1 Sim. & Stu. 190, and in Mason *v.* Hill, 3 B. & Ad. 304, the rule I have stated is noticed and vindicated. In the first of these cases, on the authority of which the second was finally determined, the master of the rolls observed, "Every proprietor who claims a right either to throw the water back, above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from proprietors affected by his operations, or must prove an uninterrupted possession of twenty years." And he adds, "An action will lie at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of the common right." To the same effect is Arnold *v.* Foot, 12 Wend. 330. There it was held that the owner of land upon which a spring rises has no right to divert it from its natural channel, although its waters are not more than sufficient for his domestic uses, for his cattle, and for the irrigation of his land. The sum of the authorities may be thus briefly stated: Though every proprietor has a right to the reasonable use of the water running through his lands, he can not, by the mere act of opposition, diminish the quantity of water which ran through his neighbor's land, to the prejudice of his estate in point of value, although enough was still left to the neighbor for the purposes for which he had actually used the water. Though this is the settled doctrine, some difficulty frequently occurs in its application to particular cases, arising principally from the peculiar uses to which water may be applied, and the consequent necessity of managing it in a particular way. Thus in Pennsylvania it was held in Hoy *v.* Sterrett, 2 Watts 327, and subsequent cases, that an upper mill-owner is not answerable to one lower down the stream, for detaining the water in his dam for several days, if this be necessary to the action of his mill, though the lower mill is thereby injured. This would seem to arise from the necessity of the case, and the impossibility of using the water beneficially in any other way; though even these considerations have not produced uniformity of opinion, for Pothier lays down the rule that the owner of the upper stream must not raise water by dams so as to make it fall with more abundance

and rapidity than it would naturally do, and injure the proprietor below. Traite du Contrat de Societe, Second App. No. 236. Of this rule, however, Kent justly observes it must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. The reasonableness of the detention of the water by the upper proprietor, must depend on the circumstances of each case, and is to be judged of by the jury. Hetrich *v.* Deachler, 6 Barr 32. In judging of the proper use of water, the size and capacity of the stream rightly enters into the inquiry. The distinction taken by the court below between a stream so large as to be properly designated a creek or river and a mere rivulet used for the purposes of irrigation, is perfectly well founded. In the one case, of course a much larger quantity may be absorbed without perceptible diminution or actual injury, than in the other. In the use of it, some evaporation and decrease of it, and some variation in its weight and velocity, must necessarily take place. In such case the maxim is, *de minimis non curat lex*. But whenever so much of the volume of water is obstructed as to be plainly perceptible in its practical uses below—whenever the channels which before were filled, exhibit the loss of the accustomed fluid, an injury is committed for which an action may be sustained, though it may not have been actually used by the lower proprietor. It is scarcely worth while to elaborate the subject, which, in the aspect it assumes in the case in hand, is sufficiently simple. It may not, however, be useless to illustrate it by the remark, to which all must assent, that the owner above can not take all of the stream, and this drives us necessarily upon the rule that he shall not materially diminish it, for, from the very nature of the subject, there is none other of practical operation.

For this reason, we find no error in that part of the charge principally complained of. The learned judge was right in saying that "the question does not turn on whether the occupier below, who complains, has sufficient water left for his domestic purposes, or more than he was previously using from the stream; but whether the quantity flowing on his land, which he had a right to use, has been materially lessened or diminished? There is nothing in the bill of exceptions. The second of them was properly abandoned, and the first is not better founded. The declaration made by the defendant of his interest was certainly evidence, leaving it open to him to show he had never carried it into effect. It was proper to show the spirit by which he was actuated, if for nothing else.

Judgment affirmed.

HARRIS ET AL *v.* HARRISON ET AL.

1892. SUPREME COURT OF CALIFORNIA

93 Cal. 676, 29 Pac. 325

MCFARLAND, J.: This action was brought to quiet plaintiffs' title to the right to the use of certain water, alleged to flow naturally through a stream called "Harrison canon." Judgment was rendered for plaintiffs, and defendants appeal.

Plaintiffs and defendants are the owners of adjoining land; defendants' land lying on Harrison canon, above and to the north of the land of plaintiffs. The real merits of the case, underlying incidental points of pleading and practice, rest upon the issue whether or not there is any water-course in Harrison canon. Defendants undertook to maintain by their evidence that the general character of Harrison canon was that of a dry, sandy gulch, with practically no running water in it, except during great and unusual rain-storms, when temporary torrents bring down large masses of sand and debris, which fill up the gulch and so change it that it could not be said to have any well-defined bed or banks; that ordinarily there was no water in the canon, except a little that oozed out of two springs on defendants' land, in quantities too small to form a current strong enough to flow down to plaintiffs' land; and that defendants, by digging into said springs and removing obstructions, developed a small stream, which they use to irrigate their land. Plaintiffs introduced evidence tending to show the contrary of defendants' contention; and tending to prove that there always has been, and is, a natural stream of water running down said canon to and upon plaintiffs' land, independent of said unusual storms. The judge of the court, with counsel for both parties, and a civil engineer (Finkle), visited the premises, and observed the various points alluded to in the testimony. The evidence was certainly very conflicting; and, without reviewing it here in detail, it is sufficient to say that its character is such that the finding of the lower court that there was a water-course, as claimed by plaintiffs, must be taken as final.

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3. The most important question of law involved in the case, (although not much argued in the briefs), arises out of the form of the judgment. The court found "that, in order that the water of said stream may be made available for the purposes of irrigation to advantage, it is necessary that the full flow of the stream be used at once;" and it was decreed in the judgment that plaintiffs are the owners of, and entitled to the full flow of, the water, every 3½ days out of every 7 days, and that defendants are entitled to such flow for 3½ days out of every 7, and plaintiffs' title to such flow is

quieted. Appellants contend that the above finding and the judgment are outside of the issues made by the pleadings. Plaintiffs alleged in their complaint that they were entitled to the flow of "all the waters" flowing in Harrison canon; and defendants, in their answer, denied that plaintiffs were entitled to the flow of any of said waters. The court found and decreed, substantially, that plaintiffs were entitled to the flow of some of said waters, but not of all, and that their right to have the waters of said creek flow down to and upon their land was subject to the use of said waters by defendants as upper riparian proprietors. Now a plaintiff in an action to quiet title, or in an action of ejectment, does not lose his case by a failure to establish his title to the whole of the property described in his complaint. He may recover, upon sufficient proof, either a segregated part of the premises sued for, or an undivided interest therein. And so, if the judgment in the case at bar had been for a certain part of the continuous flow of the stream, as, for instance, one-half thereof, or a certain number of inches, there could have been no objection to its form. In that event, plaintiff would have simply recovered, in the ordinary way, a part of the property for which he sued. But could the court apportion the use of the water between the parties, as was attempted to be done by the judgment?

According to the common-law doctrine of riparian ownership, as generally declared in England and in most of the American states, upon the facts in the case at bar, the plaintiffs would be entitled to have the waters of Harrison canon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor; and this must be taken to be the established rule in California, at least where irrigation is thus necessary. Lux *v.* Haggin, 69 Cal. 394. Of course, there will be great difficulty in many cases to determine what is such reasonable use; and "what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case." Lux *v.* Haggin, supra. The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor.

In the case at bar only the rights of two riparian proprietors are to be considered. None other are involved. And the amount of water in the stream is so small that it is apparent that defendants could not use it for any useful irrigation without practically absorbing it all, and leaving none to flow down to plaintiff's land. There was sufficient evidence to warrant the finding of the court that in order to irrigate, "it is necessary that the full flow of the stream be used at once." But defendants, as well as plaintiffs, were entitled to a reasonable use of the water for irrigation; and the rights of neither could be declared or preserved by an attempted division of the flow of the water without reference to time. The only way, therefore, to preserve those rights, and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternate periods of time; and we do not see why the court could not decree a division of the use of the water according to that method, when there was no other method by which it could be done. And that the division was a just one, and not erroneously determined upon, seems clear. The evidence showed that the arable and irrigable land of each party was about equal in area; and there is no contention that the division was not equitable, provided that all the other facts were correctly found by the court.

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Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.; Paterson, J.; Harrison, J.; Garoutte, J.

SOUTHERN CALIFORNIA INVESTMENT COMPANY *v.* WILSHIRE ET AL.

1904. SUPREME COURT OF CALIFORNIA

144 *Cal.* 68, 77 *Pac.* 767

SHAW, J.: The complaint states a cause of action to quiet the alleged title of plaintiff to the use of all the waters of a certain stream in San Bernardino county, known as "Edgar creek." The answer denies plaintiff's title, and sets forth the title of defendants. The plaintiff appeals from the judgment, and from an order denying its motion for a new trial. * * *

The judgment declares that plaintiff and defendants are riparian proprietors upon the stream, and have, respectively, the right to use the water of the stream "proportionately to the frontage of their lands upon the said stream, considered with regard to the whole frontage of land upon said stream"; that the defendants are the owners and entitled to the full, free, and uninterrupted

use and enjoyment of all the surface waters of the creek flowing at their point of diversion near the north line of their lands; that the plaintiff is entitled to all the waters of the stream customarily flowing in the stream at its dam, a short distance above its land, where the ditch begins by which it acquired the prescriptive right referred to in the findings; and that all the rights of the plaintiff in the waters of the stream are subject and subordinate to the prescriptive rights therein adjudged to be owned by the defendants.

The judgment declaring the measure of the respective riparian rights of the parties is not correct. Where two persons own land along the line of a water-course, the measure of their rights is not necessarily controlled solely by the length of their respective frontages on the stream. Many other things may enter into the question. One may have a tract of land of such character that but little use could be made of the water upon it, while the land of the other may all be so situated that it could be irrigated with profit and advantage. In Harris *v.* Harrison, 93 Cal. 681, it is said: "In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem." And the general rule is there stated to be, in cases where there is not water enough to supply the wants of both, that each owner has the right to the reasonable use of the water, taking into consideration the rights and necessities of the others.

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WIGGINS *v.* MUSCUPIABE LAND AND WATER COMPANY

1896. SUPREME COURT OF CALIFORNIA

113 *Cal.* 182, 45 *Pac.* 160, 32 *L. R. A.* 667, 54 *Am. St.* 337

HARRISON, J.: The plaintiff is the owner of a rectangular tract of land, having an area of 1,000 acres, lying to the south and west of a larger tract belonging to the defendant, the Muscupiabe Land and Water Company, and through both of these tracts of land there flows a stream of water known by the name of "Devil Canyon creek." This stream has its source in the mountains north of the defendant's tract, and flows through the canyon in a southerly direction, and thence southerly and southeasterly, through the defendant's tract of land, to the north line of the plaintiff's tract, which it crosses in a southeasterly direction, and again enters the defendant's tract.

The length of its course through the defendant's land before it reaches the plaintiff's land is 15,570 feet, and its course southeasterly across the plaintiff's land is 3,200 feet in length, when it again enters the land of the defendant, through which it flows for 13,450 feet. Of the lands of the plaintiff, only the northerly 245 acres are within the watershed of this stream, and riparian thereto. With irrigation this land can be made productive, but without irrigation it is dry and practically useless. The land of the defendant, which lies to the north of the plaintiff's land, adjacent to and bordering upon the stream, is rough, rocky, sandy, and worthless, and for the first 4,000 feet south of the place where the stream enters this land is not susceptible of cultivation. Below this point, and at a short distance to the eastward of the stream, a portion of the defendant's land—about 1,200 acres in extent, lying north of a prolongation of the north line of the plaintiff's tract—is within the watershed of the stream, and, if irrigated from the stream, may be made productive. In July, 1891, the defendant diverted upon this land all the waters of the stream above the plaintiff's tract, and thereupon the plaintiff commenced the present action for the damages sustained thereby, and to enjoin the defendant from any further interference with the flow of the stream. The cause was tried by the court, which found, in addition to the foregoing facts, the following: "(22) The most valuable use to which the water of said stream can be put is that of irrigation. The portion thereof that would be required for domestic and culinary purposes and for watering stock would not perceptibly diminish the volume of water flowing in the stream, when there is sufficient therein to be available for irrigation. (23) The bed of said stream is sandy and porous, and the air in that locality is, during the irrigating season, dry and hot. The quantity of water usually flowing in the stream varies greatly in different years, and in different seasons of the same year, and considerably in different portions of the day, there being more flowing at night than in the daytime. The usual irrigating season lasts from June 1st to October 1st. During the winter season, and when the water is not wanted for irrigation, there is more water flowing therein than is needed, or can be used, by the riparian owners. After the water enters the lands of the Muscupiabe Land and Water Company, a large portion thereof is lost by evaporation and by absorption, before it reaches the one-thousand-acre tract of said Wiggins. The flow of the stream also greatly diminishes from the end of the rainy season until about August 15th of each year. (24) In a season of average rainfall, when there is no diversion of the water of said stream, the usual flow of the water therein at the point where it enters the land of said Muscupiabe Land and Water Company, and at the point where it enters the land of Wiggins, computed in miners' inches, measured under a four-inch pressure, is as follows: 'From July 1st to July 15th: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. From July 15th to September 10th:

At the north line of said company's land, one hundred inches; at the north line of Wiggins' place, none. From September 10th to October 1st: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. When there is no more than one hundred inches at the point where said stream enters the land of said company, the same is all taken up by evaporation and absorption, so that none of it reaches the one-thousand-acre tract of said Wiggins.' (25) The said Muscupiabe Land and Water Company has constructed and now maintains a dam across the said stream, and a ditch leading therefrom onto the land of the company aforesaid sufficient in size to carry all the waters of said stream. When, during the irrigating season, the water of said stream is all diverted in said ditch until the bed thereof below the said dam becomes dry, and the water is afterwards turned again down and allowed to flow in said stream uninterrupted, it requires two days' flow before any of it will reach the one-thousand-acre tract of Wiggins, owing to the absorption of water by the creek bed, and the evaporation by the heat and dryness of the air, and the said stream does not attain its full flow at the north line of Wiggins' tract until about five days after it is so returned to said stream. (26) If the said stream were divided by quantity at the dam of said company, and the proper proportion in quantity which would be due to each of said riparian owners for his reasonable use thereof was allowed to flow in separate streams to each, the amount allowed to said Wiggins would be so small that none of it would ever reach his land. (27) The amount of water required to irrigate such of the lands of the said company and of said Wiggins as is properly susceptible of irrigation is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land. (28) Under all the circumstances and facts in this case, a reasonable and equitable division of said water between the said Muscupiabe Land and Water Company and the said Wiggins would be to allow to the said Wiggins the full flow of the stream, uninterrupted and continuous, for eight days out of each forty days, beginning April 1st of each year, upon said one-thousand-acre tract, and to allow to the said Muscupiabe Land and Water Company the full flow of the stream during the remaining portion of each period of forty days: provided that, when there are no more than one hundred miners' inches of water, measured under a four-inch pressure, flowing in said stream at the point where it enters the land of the said Muscupiabe Land and Water Company, the said company should be allowed to divert all the water of said stream, and to continue so to divert the same until there are more than one hundred inches aforesaid flowing at said point." The conclusions of law, and the judgment thereon, follow substantially the twenty-eighth finding, and by the judgment the plaintiff is enjoined from diverting the water of the stream for use upon any portion of his one-thousand-acre tract, except the northerly two hundred forty-five acres thereof,

and the defendant is enjoined from diverting the waters of the stream for use anywhere, except upon its land lying to the north of a line drawn in prolongation of the north boundary of the plaintiff's tract. From the judgment thus rendered the plaintiff has appealed, bringing the appeal here upon the judgment roll alone, without any bill of exceptions, and urges in support of his appeal that the findings of fact are insufficient to sustain or justify the judgment.

One of the grounds for a reversal urged by the appellant is that the judgment fails to provide for his right to use the waters of the stream for culinary or domestic purposes. The claim that this right is denied by the judgment is not sustained by the record. The judgment makes no limitation upon the use to which the water shall be applied by either of the parties, except that it shall not be used upon land which is not riparian to the stream. The principle contended for by the appellant is that the court had no authority to render a judgment by which he would be prevented from a continual flow of the stream for these purposes, and, although he has cited expressions from some opinions in support of this contention, an examination of the cases in which they occur fails to sustain the principle invoked by him. The opinion of Mr. Justice Thornton in Stanford *v.* Felt, 71 Cal. 253, was not concurred in by any of the other justices; and in Water Company *v.* Hancock, 85 Cal. 219, it was held that the plaintiff had no interest in the waters of the stream, and consequently the use to which the water might be applied by either party was not before the court for consideration. By the common law a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying his natural wants for domestic uses and for cattle, and the right to its use for his artificial wants, such as pleasure grounds, manufacturing, etc.; and although, in the exercise of this right, the superior proprietor might make any reasonable use of the flow of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, he could not exercise the right for any extraordinary use that would interfere with the rights of the inferior proprietors, or interrupt the regular flow of the stream, if thereby he interfered with its lawful use by them. Miner *v.* Gilmour, 12 Moore, P. C. 156; Wadsworth *v.* Tillotson, 15 Conn. 366.

The power of a court of equity to apportion the flow of water in a stream to the respective riparian owners by periods of time, rather than by a division of its quantity, so that each may have the full flow of the stream during such designated periods, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners, was fully considered and established in Harris *v.* Harrison, 93 Cal. 676. * * * In an arid country, water for irrigation may become a natural want of man, as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed. See Evans *v.* Merri-

weather, 3 Scam. 496. When, as in the present case, a stream, instead of increasing as it goes towards the sea, constantly diminishes, until it finally disappears, or ceases to have any appreciable volume, it is very evident that its beneficial use can be regulated better by periods of time, rather than by a division of its quantity. A perpetual use of the water by all of the proprietors would be impracticable, for the reason that a perpetual use by the upper proprietor would, during a large portion of the year, entirely deprive the lower proprietor of any flow, and a just protection of the rights of both is best effected by its division in periods of time. In Harris *v.* Harrison the plaintiff claimed in his complaint the right to divert the waters of the stream for domestic uses as well as irrigation, but the power of the court to apportion the water for purposes of irrigation was the point chiefly presented and considered in the opinion of the court. The same principles, however, which authorize an apportionment of the flow by periods of time, for purposes of irrigation, justify such apportionment for domestic uses. The use to which different proprietors may apply the waters of the stream which flows through their lands is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied; but it is a right annexed to the land, and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights.

The evidence before the superior court has not been brought before us, and we must assume, not only that the findings of fact made by that court were sustained by the evidence, but also that the findings which were made contain all the facts which the evidence before the court authorized it to make. As the appellant must show that the court below has committed error, it was incumbent upon him, if he would controvert the correctness of its judgment by reason of its failure to make suitable provision for his domestic needs, to show that he offered evidence upon this issue, and that the court failed to give due consideration to this evidence. By invoking the aid of a court of equity to protect him in his rights, he binds himself to recognize and observe the rights which the court may determine are held by others in the same subject-matter; and, if he would question the judgment of the court upon these relative rights, he must show that he presented to the court evidence of the rights which he claims the court has failed to protect. Not only does the record fail to disclose that any evidence was offered by the appellant tending to show that he requires any water for domestic uses, but the finding of the court that his tract of land, without irrigation, is dry and practically useless, tends to destroy his claim for such uses. In the absence of the evidence, we must hold that, in its allotment of the amount of water to be given to each party, the court took into consideration all of the uses for which it was shown that

the water was available,—domestic uses as well as irrigation; that it considered the rights of the respective claimants, as well in view of the purposes for which the water was required, as of the amount of water available for such purposes. The finding of the court that the only way to provide for a reasonable use of the water is to divide its flow by periods of time, as well as its finding of the specific periods which, "under all the circumstances and facts in this case," would be a reasonable and equitable division of the water, must be held to be justified by the evidence, and to provide for all the uses to which either proprietor is entitled to apply the water. It can not be said, as a matter of law, that the inferior proprietor has a necessity for a continuous flow for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, and what is a reasonable use is a question of fact, depending upon all the circumstances appearing in each case. If neither of the proprietors has any use for the water other than for domestic purposes, a court would naturally fix the length of the periods during which each should be entitled to the flow, as well as the frequency of their recurrence, different from what it would if the waters of the stream were used for irrigation; but, whenever it should appear from the circumstances of the case that the only method by which either proprietor could have a reasonable use of the stream would be to allow to each its full flow for a reasonable time, the only equitable adjustment of their rights would be to thus apportion the flow. Whether this apportionment should be for alternate weeks, or alternate days, or for a specific portion of each day, must be determined by the facts of each case, and in the absence of the evidence of these facts the action of the trial court must be held to be correct.

The record does not disclose the amount of water flowing in the stream at any other dates than between the 1st of July and the 1st of October, or that there is at any time a flow of more than 150 inches at the point where it enters the land of the defendant; and, although it may be assumed that the loss by absorption and evaporation is greater during the summer than in the winter, the only finding upon this point is that, when there is no more than one hundred inches at the point where the stream enters the land of the defendant, the same is all taken up by evaporation and absorption, so that none of it reaches the one-thousand-acre tract of the plaintiff, and that in a season of average rainfall this is the actual loss between July 1st and October 1st. The loss by absorption and evaporation is so great that, without any consumption by the defendant for any purposes, only fifty inches would reach the land of the plaintiff at any portion of this period. How much of this fifty inches is consumed or required by the defendant for domestic purposes or natural wants is not shown, but it is consistent with the findings of the court to assume that it appeared from the evidence before it that the necessities of the superior proprietor for domestic uses were such that, by giving

him the right to a continuous flow, none of the water would reach the land of the plaintiff during the irrigating season. It is very evident from the record that the cause was tried with reference to the rights of the respective parties to the water for purposes of irrigation, and that the right to the water for domestic purposes was not considered an issue in the case, or made a subject of controversy at the trial. Although, in his complaint, the plaintiff alleged, in general terms, his right to the waters of the stream "for the irrigation of said land, and for culinary and domestic purposes," his specific allegations that during the irrigating season "no more water reaches his land than is required for irrigating the cultivated portion thereof," and that he has no other source of irrigating the cultivated portion of his tract than from the waters of the stream, and the further allegation that the damage which would be sustained by him in consequence of a diversion of the waters by the defendant, and for which he sought the aid of the court, was the destruction of the fruit trees and vines and alfalfa growing on the land, justify the conclusion that the right to divert the waters for irrigation was the only issue presented to the court. The finding of the court that the most valuable uses to which the water of the stream can be put is that of irrigation, and its further finding that when there is sufficient water in the stream to be available for irrigation the portion that would be required for domestic and culinary purposes would not perceptibly diminish its value, corroborate this conclusion.

It is further contended by the appellant that, inasmuch as the court finds that he has cultivated eighty-five acres of his irrigable land, and that the respondent has cultivated only thirteen acres of its irrigable land, and, as it does not appear that the respondent intends in the future to irrigate or cultivate any greater area, the judgment should not have given the defendant the use of the greater portion of the water. The right of a riparian owner to the use of the water is not, however, measured by the amount which he actually uses, and it is not to be assumed that the same amount of land will be cultivated in every succeeding year. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation, would be properly made a controlling element in adjusting their respective rights to the flow of the stream; otherwise a readjustment would be necessary whenever either party should cultivate a greater or less area. The finding of the court that "the only method by which the plaintiff can be given the reasonable use of said stream is to divide the flow of the stream by time, and allow him the full flow of the stream during such time as may be reasonable," furnishes the principle upon which this portion of the judgment rests; and the further finding that "the amount of water required to irrigate such lands of the defendant and of the plaintiff as are properly susceptible of irrigation is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land," gives the basis for the application of the principle in behalf of the

respective parties. The judgment protects the plaintiff against any waste or unnecessary diversion by the defendant in case it shall not cultivate its land, or only a small portion thereof, by the provision that, when it shall not actually use all or any portion of said waters upon its irrigable land, the plaintiff shall be entitled to use the same.

The appellant also objects to that portion of the judgment which provides that the defendant may provide means for carrying to the north line of the plaintiff's land, without diminution, all of the waters of the stream in excess of one hundred inches which shall at any time be flowing at the point where the stream enters the land of the defendant, and that, if it shall elect to do so, it shall have the right, at any of the times during which the plaintiff is by the judgment entitled to the use of the waters of the stream, to deliver said excess to the plaintiff at the northerly line of his tract, and that, if it shall so deliver said excess to the plaintiff during the time it shall make such delivery, it shall have the right to appropriate to its own use the said one hundred inches. This provision in the judgment is based upon the finding that one hundred inches of the water of the stream is lost by absorption and evaporation between the time that the stream enters the land of the defendant, and before it reaches that of the plaintiff, and accords with the simplest principles of equity in the adjustment of the respective rights to the waters of the stream. The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream, where it enters its land, and preserve and utilize, the one hundred inches, which would otherwise be lost by absorption and evaporation. The judgment is affirmed.

We concur: McFarland, J.; Garoutte, J.; Van Fleet, J.; Temple, J.; Henshaw, J.

Section 4.—Pollution

MERRIFIELD *v.* LOMBARD

1866. SUPREME JUDICIAL COURT OF MASSACHUSETTS

13 *Allen* (*Mass.*) 16, 90 *Am. Dec.* 172

Bill in equity, setting forth that the plaintiff is the owner of land bordering upon a natural stream in Worcester; that he has a factory upon his said land, with steam-power, and has used the water of the stream for his boiler; that the defendant, within the last three years, being a manufacturer, has thrown vitriol and other noxious sub-

stances into said stream, a short distance above the plaintiff's factory, by means of which the water has been corrupted, so that it has corroded the plaintiff's engines and boilers, and been rendered unfit for use; and that the defendant has refused to discontinue such practice, though requested. The prayer was for an injunction, and other relief.

The answer alleged that the plaintiff's factory was built since that of the defendant, and below the same, and that for more than twenty years before the filing of this bill, and before the building of the plaintiff's mill, he used his mill and premises in the same manner now complained of, and admitted the effect upon the plaintiff's machinery, and the request to discontinue the use, as charged.

The parties agreed that, in the use of the premises by the defendant, or those under whom he claims, twenty years prior to the filing of the bill, only small quantities of vitriol and other noxious substances were thrown into the stream, and produced no perceptible injurious effects to the water of the stream, and the injurious effects to the engine and machinery of the plaintiff have only been apparent for the last eight years.

The case was reserved by Hoar, J., for the determination of the whole court.

* * * * * * * * * * * *

BIGELOW, C. J.: The case, as made by the bill, answer and agreed facts, establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural water-course passes that he should use the water in such manner as not to destroy, impair or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat,* or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a water-course runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes. Mason *v.* Hill, 2 Nev. & Man. 747; S. C. 5 B. & Ad. 1; Wood *v.* Waud, 13 Jur. 472; S. C. 3 Exch. 748; 3 Kent Com. (6th ed.) 439; Angell on Water-courses, sec. 136.

It is conceded in the present case that, by the mode in which the defendant conducts his business, a large quantity of poisonous and corrosive substances is permitted to run into the water of the stream on which the plaintiff's and defendant's manufactories are both situated, which defiles and corrupts the water to such an extent that the machinery of the plaintiff is corroded and destroyed, and the use of the water for reasonable and proper purposes is impaired and prevented. We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused as against a riparian owner of land on the same stream below. No fact appears in this case from which any right by grant, prescription or adverse use is shown to exist, by virtue of which the defendant can claim to use the stream otherwise than as a riparian owner, entitled to the natural and ordinary rights and privileges which usually and legally attach and belong to the owner of land on the banks of a water-course. It is clear, therefore, that he has been guilty of an infraction of the plaintiff's rights.

The right of the latter to equitable relief is clear and unquestionable. The acts of the defendant tend to create a nuisance of a continuous and constantly accruing nature, for which an action of law can furnish no adequate relief. Angell on Water-courses, secs. 444-446; Bemis *v.* Upham, 13 Pick. 169; Hill *v.* Sayles, 12 Cush. 454.

Perpetual injunction granted.

BAINARD *v.* CITY OF NEWTON

1891. SUPREME JUDICIAL COURT OF MASSACHUSETTS

154 *Mass.* 255, 27 *N. E.* 995

HOLMES, J.: This is a bill in equity to enjoin the city of Newton from discharging sewage into a brook, called "Cheese-Cake Brook," above the plaintiff's land upon the brook, and from emptying more water into it than would flow into it naturally. The master's report shows that the city has constructed a system of surface drainage in some of its streets and ways, under the powers relating to the public streets and ways, and that no drainage comes into the brook except what comes from the ordinary wash of these streets and ways. In one place in the watershed west of the brook the surface water gathered into a small stream for some thirteen hundred feet, and then spread over the surface again, and disappeared below the plaintiff's land. A "small, but substantial," portion of the water from the western watershed, including, perhaps, a portion of the last-mentioned water, and water from the eastern watershed, which

before had not entered the brook, now flows into it through the drains. The increase occurs mainly in heavy rains and sudden thaws, generally does not last many days, and is not found to cause the brook to overflow. The surface drainage into the brook being now from streets, the water is no longer clear, the fish have been driven from it, and at times it has a disagreeable smell, not found to amount to a nuisance.

Upon these facts we are of opinion that the bill must be dismissed. The pollution of the water by the usual impurities from streets is not a cause of action. The use of his land for streets, with the usual consequences to owners lower down upon the stream, would not exceed the common-law rights of an upper owner. Wheeler *v.* Worcester, 10 Allen 591, 602; Merrifield *v.* Worcester, 110 Mass. 216, 220. See Middlesex Co. *v.* McCue, 149 Mass. 103. Equally little can the plaintiff complain of the increased discharge of surface water into the stream. We do not say that no change of the watershed on a large scale could give rise to a cause of action on the part of a lower proprietor. But a change which only slightly and occasionally enlarges the flow of a natural stream within its capacity, and does not make it overflow, is not actionable. Jackman *v.* Arlington Mills, 137 Mass. 277, 283. Again, so far as appears, all the damage to the plaintiff, if any, was the necessary consequence of the laying out of the streets and ways from which the surface drainage came. If so, and if the statutes impose a greater liability than the common law for this damage, when so caused, Woodbury *v.* Beverly, 153 Mass. 245, the only remedy is under the statute, Flagg *v.* Worcester, 13 Gray 601, 603; Wheeler *v.* Worcester, 10 Allen 591, 603; Collins *v.* City of Waltham, 151 Mass. 196, 198.

Bill dismissed.

JOHN YOUNG AND COMPANY *v.* THE BANKIER DISTILLERY COMPANY ET AL.

1893. . SCOTLAND. HOUSE OF LORDS

L. R. 1893 *A. C.* 691

LORD WATSON: My Lords, the facts of this case, which may be shortly stated, give rise to a question of general importance.

The respondents are owners under a feu right which excepts minerals of a parcel of land in the county of Stirling, bounded on the west by a small stream known as the Doups Burn, which has its course from north to south. A distillery was erected about sixty years ago by their predecessors in the feu, and has been in use ever since. The appellants are tenants of the reserved coal below the feu, and of a considerable tract of the adjoining coal seams. In the

course of their mineral workings they raise water by pumping from a pit on the north, which they discharge into the Doups Burn before it reaches the respondents' land. So far the facts do not appear to have been disputed in the court below.

Upon the evidence the learned judges of the first division have unanimously held, and I have seen no reason to differ from their conclusions: (1) That the water added by means of the appellants' pumping operations could never reach the burn either before or whilst it flows along the respondents' feu, if it were left to the law of gravitation. (2) That the water of the burn is pure and soft in quality. (3) That the added water, though pure, is hard in quality. (4) That the addition is of volume sufficient to make the water of the burn, as it passes the respondents' land, hard instead of soft; and (5) That the hard water so produced is much less suitable for distilling than the naturally soft water of the burn.

From the judgment delivered by the Lord President it appears that the respondents in maintaining their right to have the appellants interdicted from discharging the pit water into the Doups Burn presented their case in two different aspects. In the first place, they complained of the quality of the pit water on the same footing as if it had been water taken from the burn, used by the appellants for some secondary purpose, and then returned to the stream in a pure but hard condition. In the second place, they complained that the pit water, which could not find its way to the burn in the natural course of events, had been introduced by artificial means to their prejudice.

Upon the first hypothesis their Lordships' decision was in favour of the appellants. They appear to have affirmed that it is the right of a riparian proprietor not only to use water for secondary purposes, but in so using it to alter its chemical properties to any extent, so long as he does not render it impure, in the sense of being unfit for primary uses. To that view of the law I am not prepared to assent. It was not necessary to decide the point; and its decision is unnecessary for the disposal of this appeal. But seeing that it was decided, I think it right to say that I am not satisfied that a riparian owner is entitled to use water for secondary purposes, except upon the condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired. I am not satisfied that in returning the water in a state fit for primary uses he has any right to alter its natural character, and so make it unfit for uses to which it had been put, or might be put, by a riparian proprietor below.

Upon the second contention, their Lordships decided against the appellants, and granted interdict accordingly. The ratio of their decision is very clearly and forcibly stated by the Lord President, with whose opinion I entirely concur.

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the

surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbor's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

The law of Scotland upon this point is the same with that of England. In Blair *v.* Hunter, Finlay & Co. Lord Gifford said: "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible." The rule that the upper heritor can not interfere with the gravitation of the water so as to make it more injurious to the land below is clearly stated by Erle, C. J., in Baird *v.* Williamson, which was rightly accepted by the First Division as establishing a principle conclusive of the present case. Against that principle the appellants were only able to cite one American case, which I do not notice further, because it was decided on the express ground that in so far as concerns the present question the law of Pennsylvania essentially differs from the law of England.

I therefore move that the interlocutor appealed from be affirmed, with costs.[6]

McEVOY ET UX. *v.* TAYLOR ET UX.

1909. SUPREME COURT OF WASHINGTON

56 *Wash.* 357, 105 *Pac.* 851, 26 *L. R. A.* (*N. S.*) 222

MORRIS, J.: Appellants own a small tract of land on the outskirts of Walla Walla. Springs of water rise upon the land, and the waters therefrom form a small pond about twenty feet in width and forty feet in length. From this pond the water flows in a small stream down upon and across respondents' property. The action was brought, alleging the pollution of the water by appellants in permitting their horses, cattle, and geese to use the pond so as to befoul its waters and render its use unfit for respondents. The action resulted in the court enjoining the appellants from permitting their horses, cattle, or geese from entering into and corrupting the water, so as to

[6] The preliminary statement of facts, abstracts of arguments of counsel, and concurring opinions of Lord Herschell, L. C., Lord Macnaghten and Lord Shand are omitted.

prevent its flow in its natural purity, commanded them to clean out the spring, restoring it to its natural condition, and to remove a hog-pen situate near the head of one of the springs, which last spring, however, did not empty its water into the pond. From the decree so entered, defendants have appealed.

Respondents have not appeared in this court, so that we have not the benefit of a brief in their behalf. The only question involved in the appeal is the general one involved in the decree. The parties being riparian owners, their respective rights to the use of the water are to be determined by their rights as such riparian owners. These rights are now well established. Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and, as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others. We are speaking now of rights common and incidental to riparian ownership, without regard to, and unaffected by, any modification of grant, prescription, or prior appropriation, which ofttimes enters into and largely determines the use of water by riparian owners. In cases of this character, the question to be determined largely is: What is a reasonable use, and is the diminution and pollution of the stream other and beyond the rights accorded under a reasonable use? If the upper owner goes beyond this reasonable use and damages the lower owner, then he must answer in damages or have his unreasonable use enjoined; but, if his proper and reasonable use causes damage to the lower owner, such damage flowing from the proper use of a natural right is *damnum absque injuria.*

Having determined the character of permissive use of the water by the upper owner, we will examine the evidence to ascertain whether or no appellants' use extended beyond their rights. The tract of land owned by appellants comprises seven and one-half acres. The spring and pond are inclosed, with about one-third of an acre, by a fence with an open gateway. Appellants at the time of the trial below owned three horses, two cows, and five geese. They had at different times had as many as six cows and six or seven horses, and for about four months in the year they have as many as twenty geese; the increase being goslings which are sold each year in the fall. The cows and geese roam around in the pasture land outside the spring inclosure. The cows come down through the open gateway to the pond to drink, and the geese at times swim upon its surface. The horses are also watered there. After leaving appellants' tract, the water flows about three hundred feet, when it reaches the point where respondents take it, using it for the laundry and bathroom, but not for drinking or culinary purposes. Respondents and witnesses testify to seeing the horses, cows, and geese in the pond; that the pond sometimes has what they describe as a "green scum" on its surface, and leaves and feathers float upon it; that the water when it reaches them has a bad odor, and in their opinion is unfit for

domestic use. Other witnesses for appellants testify to drinking the water at the point of respondents' taking, and finding it sweet and clear; others that the spring and pond were clean.

It can not be gathered from all the evidence of respondents but that the use of the spring and pond by appellants was a natural use. They had the right to use the spring and pond to water their cattle or for their geese to swim upon, and the pollution of the water, being a natural incident to a proper and reasonable use, can not be restrained nor prevented. Gould *v.* Hudson River R. Co., 6 N. Y. 522, 552. In the case of Helfrich *v.* Cantonsville Water Co., 74 Md. 269, 22 Atl. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245, a case similar in many respects to the case before us, the court, discussing the rights of the parties, says: "We must confess that the right of a man to cultivate his own fields, and to pasture his cattle on his own land, is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure; and so the habits of cattle, according to their natural instincts, would lead them to stand in the water and befoul the stream; but, nevertheless, the owners of the land must not lose the beneficial use of it. The inconveniences which arise from the pollution of the water by these causes must be borne by those who suffer from them. * * * So far as we can see from the record, there was nothing unreasonable or unusual in the way in which the cattle were pastured in this lot. If Helfrich had wantonly or recklessly befouled the water of the stream, or had harassed the water company or injured its business by an immoderate and excessive exercise of his acknowledged rights, he would justly have been responsible for his conduct; but nothing of this kind can be justly attributed to him. He seems to have used his pasture as all men, time out of mind, have done in like cases. We are not unmindful of the vast number of cases where persons have been enjoined from committing nuisances on running streams, and from depositing or permitting to be deposited in them noxious, deleterious, or unwholesome matter, and from any unlawful or unreasonable thing which impairs the legitimate use of the water by riparian owners. Nor have we overlooked the numerous cases where it has been held that certain kinds of manufacturing establishments have infringed the vested rights of such owners. Our opinion is placed on the distinct ground that Helfrich was using his pasture lot in a reasonable manner, and that he had a right so to use it." A like conclusion is reached in People *v.* Hulbert, 131 Mich. 156, 64 L. R. A. 265, 100 Am. St. Rep. 588, where the court reviews many authorities, holding the ordinary use of the water for the home and cattle is a reasonable use, and hence a permissive use. In Hazeltine *v.* Case, 46 Wis. 391, 32 Am. Rep. 715, it was held that the keeping of hogs inclosed in a yard upon a small running stream was a reasonable

use, even though the hogs so befouled the stream that the lower proprietor could not use the water for culinary purposes. See also, Gould on Waters, secs. 205, 366.

We therefore hold that appellants' use of the spring and pond was a natural and reasonable use, and that it can not be enjoined. The spring which did not flow into the pond, but was likewise affected by the decree of the court, was riparian to appellants' lands, but not to respondents'; it being shown that in its natural state the water from it flowed into Garrison creek, and could not reach respondents' lot unless intercepted, piped, and thus diverted, which respondents did about two years ago; while appellants' use which was enjoined had been for twelve years. Respondents, being nonriparian proprietors, could not enjoin the use against a prior riparian proprietor. When respondents appropriated this water, they appropriated what then existed, and no cause of action is open to them to change rights acquired by a prior lawful use. Conrad *v.* Arrowhead Hot Springs Hotel Co., 103 Cal. 399.

We therefore hold the injunction was improperly issued, and the judgment is reversed, and the action will be dismissed.

Rudkin, C. J., and Gose and Chadwick, JJ., concur.

PEOPLE EX REL. RICKS WATER CO. *v.* ELK RIVER MILL AND LUMBER CO.

1895. SUPREME COURT OF CALIFORNIA

107 Cal. 214, 40 Pac. 486, 48 Am. St. 121

TEMPLE, J.: This appeal is by the defendant from the judgment and upon the judgment roll. The action was brought on relation of the Ricks Water Company to abate certain structures as nuisances. Among other things, it was charged that the defendant had constructed and was maintaining on the banks of the south fork of Elk river "a large sawmill, and also a cookhouse, outhouses, barn, and stables, and other fixtures which usually accompany a sawmill." It was averred "that said defendant has caused and permitted, and does cause and permit, all sewage, offal, waste and fetid matter from said sawmill, cookhouse, and stables to be drained and deposited in the waters of said stream, and continues to do so, thereby contaminating, polluting and rendering the same unwholesome, and unfit for culinary and other general domestic purposes, and offensive to the senses." As to most of the structures mentioned, the court found that they did not constitute nuisances, but it was found as follows: "That on the banks of said stream, just above the mill dam, defendant had erected a large stable, in which it houses from twenty-five to

thirty head of cows; that the droppings from these cattle are deposited upon the banks of said stream, and near thereto, where the land gradually slopes to the same; that there now exists at said point a pile of manure about seventy feet in length, eight feet deep and sixteen to eighteen feet in width, and which has been accumulating there for years; that the defendant allows and permits this large pile of manure to lie there and rot on the bank of said stream, and the drainage therefrom flows directly into the waters of said stream, and pollutes the same, and renders the waters thereof offensive to the senses and unwholesome and unfit for domestic uses; that defendant also maintains near said stream a corral or pen, in which it keeps about twenty-five hogs; that the said stream forms one side of said pen, and the urine and droppings and filth from said hogs find their way into said stream, thereby polluting the waters thereof, and rendering the same offensive to the senses and unwholesome and unfit for domestic uses." And as matter of law it was found that the hog pen and manure pile constitute nuisances, and defendant was enjoined from maintaining them. From this part of the decree defendant appeals, and his first point is that this finding is not within the issues. The hog pen and manure pile are not mentioned in the complaint, and it is not found that they are such fixtures as usually accompany a sawmill. The complaint, however, speaks of outhouses and stables, and I think the findings sufficiently show that the cow stable and hog pen are maintained in connection with the mill plant; and, notwithstanding appellant's criticism, that the manure pile is caused by the cow stable. Beyond this, the complaint seems to be that the court did not suppress the stable itself, rather than the use of it, which renders it a nuisance. I do not think there was any error here of which the defendant can complain.

2. The court found that Elk river is not a navigable stream. It is contended that it follows from that fact that fouling its waters can not constitute a public nuisance. But it is found that "the waters of Elk river at and below the defendant's dam were, and have been, and now are, used by a considerable number of persons, who reside along the banks of said stream below the defendant's mill and dam." This constitutes such a public use as would make a pollution of the water by any unreasonable use a public nuisance. We may leave out of view, therefore, the claims of the Ricks Water Company and the inhabitants of the city of Eureka altogether. While, as to lower riparian owners, the defendant is entitled to a reasonable use of the water, he has no right to pollute the stream by putting such matter directly into it. The decision does not go to the extent that appellant apprehends. It does not determine that one may not depasture stock upon the lands comprising the watershed drained by the river, because they would necessarily pollute the water, nor that he can not maintain stables and hog pens upon the land, but only that they

must not be in, or directly upon, the banks of the stream. It holds that this is an unreasonable use of such streams by a riparian owner as against lower riparian owners. But if stock, not confined upon the river banks, following their natural instincts, cause such pollution, it would be a different matter. So, if the hog pen and the cow stable were at a reasonable distance from the river, the fact that the winter rains washed some impurities into the stream would be something of which lower riparian proprietors could not complain. The acts enjoined are equivalent to actually putting the polluting material directly into the water. If the conformation of defendant's land is such that he can not carry on a dairy without putting such filth directly into the water, then he must find some other use for the land. This seems to be the effect of the rule laid down in People *v.* Gold Run Ditch and Mining Co., 66 Cal. 138, 4 Pac. 1152.

The judgment is affirmed.

We concur: McFarland, J.; Henshaw, J.

PACKWOOD ET UX. *v.* MENDOTA COAL AND COKE CO. ET AL.

1915. SUPREME COURT OF WASHINGTON

(*Wash.*) 146 *Pac.* 163

PARKER, J.: The plaintiffs seek recovery of damages which they claim resulted from the pollution of a natural stream of water, running through their farm, by the unlawful acts of the defendants. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiffs for the sum of $1,000, from which the defendants have appealed.

Respondents have been for some forty years past the owners of a farm in Lewis county, which in recent years they have developed into a valuable dairy farm, and through which flows a natural stream of water, known as Packwood creek. The water flowing in this stream is by nature pure and fresh, well suited for domestic and farm purposes, and especially for watering stock of all kinds. It has a continuous flow at all seasons of the year, and in its natural state of purity adds materially to the value of respondent farm. Appellant Mendota Coal and Coke Company, hereinafter called the company, has since the year 1910 owned and operated a coal mine near Packwood creek, some two miles above respondents' farm. Appellant Johnson has had the active management of the company's mine during the whole of this period. In preparing the coal for market, the company washes it by the use of water taken from Packwood creek, which, after flowing through the washing machinery, flows back into

the stream, carrying with it quantities of fine coal, rendering, as the evidence tends to show, the water flowing in the stream through respondents' farm unfit for domestic and farm purposes, and especially unfit for watering stock, which is its principal value to respondents. In the operation of its mine the company maintains some fifty dwelling houses for its employees, from which the sewage is drained to cesspools situated a short distance from the banks of Packwood creek. This is also alleged by respondents in their complaint to contribute to the pollution of the water of the stream flowing through their farm. The company is the owner of the land upon which its mine and washing machine and dwelling houses are situated, and by virtue of the ownership of that land has riparian rights in the water of Packwood creek equal with the riparian rights of respondents.

Contention is made by counsel for appellants that the evidence is not sufficient to sustain the verdict and judgment, and that, in any event, the verdict is excessive. After a careful review of all the evidence in the record before us, we have reached the conclusion that neither of these contentions can be sustained. We do not feel called upon to analyze the evidence here. We deem it sufficient to say that we are satisfied that the evidence is ample to sustain the conclusion that respondents were damaged in the sum of $1,000 by the pollution of the waters of the creek from the washing of the coal, though the evidence is not free from conflict upon that question. The evidence tending to show damage from the maintenance of cesspools in connection with the dwelling houses of the employees of the company, it must be conceded, is not at all convincing, even assuming that it is uncontradicted. This, however, would not warrant our interfering with the verdict upon the ground of insufficiency of the evidence, since the evidence of damage from the washing of the coal is sufficient to sustain the verdict. It may be here remarked that the record, read as a whole, renders it quite apparent that the principal damage claimed by respondents was that resulting from the washing of the coal, especially in that the water of the stream was thereby rendered unfit for stock watering purposes. This, we think, must have been equally apparent to the jury.

Several of the assignments of error made and relied upon by counsel for appellants challenge the ruling of the trial court in giving instructions and refusing to give others requested. Instructions requested by counsel for appellants rest upon the theory of the company's right to the reasonable use of the water of Packwood creek, even if the water should by such use become materially polluted and respondents substantially damaged thereby. The court gave to the jury, among others, the following instructions:

"I instruct you that although you find that the contamination or pollution complained of is not poisonous nor deleterious to stock or to human beings, nevertheless if it is of such nature as to render the water less fit for use for domestic, farm or dairy purposes, either by

man or beast, then in law the said stream has been polluted and contaminated for which plaintiffs are entitled to recover damages, if they have suffered any damages, and, if you find that defendants have done such acts as to render said stream less fit for such uses, your verdict must be for the plaintiff in such amount as you shall find that defendants have injured the plaintiffs in that respect."

This instruction is complained of as rendering appellants liable for even the slightest pollution of the water of Packwood creek, and thereby depriving the company of the reasonable use of the water as a riparian owner. It is possible there would be some merit in this contention if this instruction stood alone. It is, however, only a very general statement of the company's liability touching its right to the use of the water. It was followed by an instruction given to the jury by the court, as follows:

"It is indeed the right of a riparian owner to have the water of a stream come to him in its natural purity, and this rule is recognized, as well as the right to have it flow to his land in its natural flow in volume, but in reference to this, as well as the air, it is not every interference with the water that imparts impurities that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life and render it measurably unfit for domestic purposes, and thus impairs the comfortable or beneficial enjoyment of property in the vicinity. So even though you should find that the water of Packwood creek, as it now flows, is not as pure and wholesome as it was previous to the time the Mendota Coal and Coke Company commenced the operation of its mine at Mendota, yet if, by the operation of that mine, the defendants have not substantially or materially polluted the water of said Packwood creek, then under the law your verdict must be for the defendants."

These instructions, read together, we think, state the correct measure of the limit of the company's riparian right to the use of the water of Packwood creek, in the light of respondents' equal riparian right therein, and in view of the fact that the company's use of the water was concededly not for domestic or farm purposes. Putting aside, for the moment, consideration of the possible pollution of the stream by cesspools maintained by the company, we are constrained to hold that in view of the fact that the pollution of the water was caused, as the jury evidently found, from the washing of coal by the company, its liability for damages to respondents depends upon the extent of detriment to them from that cause. That is, if the acts of the company resulted in the pollution of the water of the stream flowing through respondents' farm to a substantial degree, and rendered it materially less suitable for domestic and farm purposes, and they thereby suffered substantial damages, appellants became liable therefor, though this might not be the limit of the company's right to the use of the water as riparian owner, were it putting the water to ordinary domestic and farm uses, under the law as announced by

us in McEvoy *v.* Taylor, 56 Wash. 357, 26 L. R. A. (N. S.) 222, where we held in effect that the use of the water of a stream by a riparian owner for ordinary farm and domestic purposes, such as allowing his horses, cattle, and fowl free access thereto, was a reasonable use, and did not render him liable in damages to a lower riparian owner entitled to the use of the water for farm and domestic purposes, though such use rendered the water materially less pure to such lower riparian owner's substantial damage.

The use of the water of a stream for industrial or manufacturing purposes by a riparian owner, by which it is polluted with a foreign substance, we think is quite another matter, when it comes to testing such owner's right as against a lower riparian owner entitled to the use of the water for farm and domestic purposes. In such cases at least, and possibly some others, we believe the law to be that the right to the reasonable use of water by a riparian owner for manufacturing or industrial purposes, resulting in the pollution of the water with foreign substances, is limited to the extent that such use must not materially pollute the water to the substantial damage of the lower riparian owner. This, we think, is the fair import of these instructions.

In Snow *v.* Parsons, 28 Vt. 459, 67 Am. Dec. 723, in considering the alleged pollution of a stream by a manufacturing plant, Chief Justice Redfield, speaking for the court, said:

"The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit, which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit, which would affect one stream seriously, would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water must submit to small inconveniences to afford a disproportionate advantage to others. It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts."

These observations of the learned chief justice are quoted with approval in the text of 2 Cooley, Torts, p. 1216 (3d ed.).

In Merrifield *v.* Lombard, 13 Allen (Mass.) 16, 90 Am. Dec. 172, Chief Justice Bigelow, considering the alleged pollution of a stream by a manufacturing plant, observed:

"The law requires of a party, through whose land a natural water-course passes, that he should use the water in such manner as not to destroy, impair, or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat,* or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a water-course runs, and creates a nuisance, for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water."

In Day *v.* Louisville Coal and Coke Co., 60 W. Va. 27, 10 L. R. A. (N. S.) 167, there was involved the pollution of a stream by the casting of coal and coke refuse from a mine and coke ovens in and near the water of a stream, to the damage of a lower riparian owner of farm lands bordering thereon, rendering the water "unfit for agricultural and domestic purposes." Discussing the company's claimed right to make such use of the stream by virtue of its riparian ownership, Justice Brannon very pertinently observed:

"This case involves principles very important everywhere, but especially important in this state at present and in the future; but those principles are old and have been called into requisition through many, many years in actions for the pollution of streams, and casting into them hurtful things, and depositing them upon lands of riparian owners on the stream below. The defendant contends that, as it was using its property in carrying on a lawful business very useful to the public, it is exempt from liability, as it was only exercising its rights. We are told by the able brief of the defendant's counsel that the affirmance of this judgment will be vastly hurtful and disastrous to the mining and coke interests of West Virginia, and have a tendency to detract from the value of our land, and hinder the development of the great wealth of coal and iron in the bowels of our mountains, and will be subversive of great public policy, which demands the development of our wealth therein, and tends to the weal of the whole people of the state, and that a few individuals injured thereby must be without redress. We can not accede to this broad proposi-

tion. The established maxim of centuries is, *Sic utere tuo ut alienum non laedas* (so use your own property that you do not injure another). That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society. A man has land upon a stream. He is its sole lord. No one has a right to injure that land. It is protected by the Constitution. If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal, or public weal, do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption, as it passes through his land, the man up the stream must answer in damages. One man without fault is injured by another. That is enough for liability." Greene *v.* Nunnemacher, 36 Wis. 50; Tetherington *v.* Donk Bros. Coal Co., 232 Ill. 522; Bowman *v.* Humphrey, 124 Iowa 744; Strobel *v.* Kerr Salt Co., 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. 643; H. B. Bowling Coal Co. *v.* Ruffner, 117 Tenn. 180, 9 L. R. A. (N. S.) 923, 10 Ann. Cas. 581; Drake *v.* Lady Ensley Coal, Iron and R. Co., 102 Ala. 501, 24 L. R. A. 64, and note, 48 Am. St. 77; Young & Co. *v.* Bankier Distillery Co., A. C. 691 (Eng.) 1893.

It has been well said:

"It is difficult, if not impossible, to declare a rule in language so clear and precise as that it can be applied with certainty to every case that may arise." Tenn. Coal, Iron and R. Co. *v.* Hamilton, 100 Ala. 252, 261, 46 Am. St. Rep. 48.

We believe it safe, however, to say that in the absence of rights resting upon prescription or custom, neither of which is here involved, there can be no more practical or just rule of liability resting upon riparian owners using the water of a stream for industrial or manufacturing purposes, and thereby polluting the water with foreign substances, than that damages caused by such use and pollution of the water renders such user liable to a lower riparian owner entitled to use of the water for domestic and farm purposes, whenever such damage is of a substantial nature. This of necessity results in the question being one for the jury, except in cases where the evidence is such as to leave no room for honest difference of opinion as to the substantial nature of the damage.

Our attention is called to the case of Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. 126, 57 Am. Rep. 445, which counsel for appellants principally rely upon in support of their contentions in this branch of the case. That decision has received some criticism from the courts both in this country and England. We think, however, it is, in any event, distinguishable from the case before us. The stream involved in that case was polluted by the flow of water by gravity alone from a coal company's mine. As said at page 147 of the opinion:

"It is clear that for the consequence of this flow, which by the

mere force of gravity, naturally, and without any default of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damage on the part of the defendants."

And on page 155 it is said:

"The defendants introduced nothing into the water, to corrupt it. The water flowed into Meadow Brook just as it was found in the mine. Its impurities were from natural and not from artificial causes."

The water was not taken from the stream, used in washing the coal, and returned to the stream in a polluted condition, carrying foreign substances as in this case. Even the Pennsylvania court in the later case of Lentz *v.* Carnegie, 145 Pa. St. 612, 27 Am. St. 717, disposed of a question similar to that here involved, upon a theory not materially out of harmony with our present conclusion.

* * * * * * *

We conclude that the record is free from prejudicial errors, and that the judgment must be affirmed.

It is so ordered.[7]

Morris, C. J., and Holcomb, Mount, and Chadwick, JJ., concur.

HAYES *v.* WALDRON

1863. SUPREME JUDICIAL COURT OF NEW HAMPSHIRE

44 *N. H.* 580, 84 *Am. Dec.* 105

Case by Simon F. Hayes against Jeremiah W. Waldron, for discharging sawdust and shavings from the defendant's mill into the Cochecho river, which ran through the plaintiff's meadows below the mill, and was accustomed to overflow them in times of high water, whereby the sawdust and shavings, in times of high water, were carried and deposited on these meadows. The defendant's sawmill, situate on his land on the river, was a belt mill, driven by water, and prior to 1847 the sawdust had been carried by a belt and box into the wheel pit, whence it passed off through the tail race into the river. About 1857 the belt and box were changed so as to carry the sawdust directly into the river opposite and back of the mill, which is some twenty feet from the river. At the river bank there is a bank wall some six feet high from the water, and the belt and box are some twelve or fifteen feet above the water, and extend just

[7] See Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 6 Atl. 453, 57 Am. Rep. 445; Hindson *v.* Markle, 171 Pa. St. 138, 33 Atl. 74; Beach *v.* Sterling Iron and Zinc Co., 54 N. J. Eq. 65, 33 Atl. 286; Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. 557.

beyond the wall, so as to drop the sawdust into the bed of the river. About 1852 the defendant put in a planing machine, and the shavings from it were carried away and burnt till July 4, 1858, when the defendant put in a belt and box similar to the other, and discharged the shavings into the river some twelve or fifteen feet below where the sawdust was discharged. If there had been no belts and boxes to carry off the sawdust and shavings, they would have fallen into a room under the mill, and not into the water. In the winter the sawdust and shavings accumulated where they fell into the river, and were from time to time shoveled into the river directly, or through holes cut in the ice, if frozen. The testimony was somewhat conflicting as to the extent of the accumulations and the frequency of the removals. As bearing on the question whether such discharge of sawdust and shavings into the river was a reasonable use of the stream by the defendant, he offered to show a uniform, long-continued, uninterrupted and undisputed usage for water sawmills, planing machines and shingle and clapboard machines to discharge their sawdust, chips and shavings into the stream; to which the plaintiff objected, but the court overruled the objection.

* * * * * * *

The plaintiff requested the court to instruct the jury that the defendant had no right to conduct his sawdust and shavings into the river, if they did any injury to the plaintiff's lands below; also that he had no right to discharge them into the river unless such discharge was necessary to running the defendant's mill.

The court did not give these instructions, but instructed the jury upon these points as follows:

"That in general each proprietor of land through or over which a water-course flows, has an equal right to the use of the water flowing in its natural course, without diminution, obstruction or pollution; and no one proprietor has the right to use the water to the prejudice of another's right to enjoy it; for, the water-course being common to them all, there is an equality of right among the proprietors to the enjoyment of it, and no one can use the water flowing through his land to injure or annoy those above or below. Each may use the water as he pleases, so that his user is not inconsistent with the similar rights of the other proprietors. The effect of this equality of right, when practically applied, and of the mutual limitations of right among riparian proprietors, is to qualify somewhat the general principle first stated in its practical application. While such is the general principle, in its practical application it is subject to some qualifications; else it might, if applied literally, in many cases prevent any beneficial enjoyment of the stream. For many and indeed most important purposes there can not be a beneficial enjoyment without some diminution, detention or alteration of the velocity or condition of the stream. A use that made absolutely no diminution or detention, and strictly and literally added no foreign matter to a water-course, can not often be found that would be valuable to any

one. The general principle is then subject to this qualification; that each proprietor may use and apply the water, as it runs over his land, to domestic, agricultural or manufacturing purposes, provided he uses it in a reasonable manner, and so as to work no actual or material injury to the others; and by actual or material injury is here meant infringement of the rights of others. A use that essentially or perceptibly impairs the lawful use of the proprietor below, or his power to make such use, is unreasonable. The test is not whether it produces some inconvenience or detriment to him, but whether it impairs the full, reasonable enjoyment of the stream, that he is entitled to equally with the proprietor above. Because a party is put to some inconvenience, it does not necessarily follow that his right is infringed and he entitled to recover; but if his right is infringed at all, he is entitled to recover at all events; if there are no actual damages, then nominal. These mutual rights are therefore accommodated to each other by restricting each proprietor to a reasonable use of the water and stream, such as does not perceptibly and really interfere with the right of each of the other proprietors to the reasonable enjoyment of it. The discharge of matters into the stream is lawful where and only where it is a reasonable use of the stream, when considered in reference to the equal rights of the other proprietors. Was the discharge of sawdust and shavings from the defendant's mill into the stream, as made, a reasonable use of this water-course by the defendant upon his land, within the principle suggested? The question is not, did it work to the plaintiff some inconvenience, but did it infringe his right to a reasonable use of the stream, or injuriously affect his power to enjoy that right? A use, sensibly and positively injurious by diminishing the value of the common right of any proprietor, or by diminishing his power of enjoying a reasonable use of it, is not reasonable or lawful. In determining the reasonableness of the use, all the circumstances shown were to be considered; among which were the situation and circumstances of the lands adjoining this water-course; the nature and importance of the use for which the right was claimed; how far the use, if important, could be had with practical benefit—could be of practical value without the right claimed; that is, the importance and necessity of the right claimed to milling; the extent of the detriment, inconvenience, or injury that such use would in fact inflict on the proprietor below, and also the mode and extent of the discharge made; these were to be considered, with all the other circumstances proved in the case. If they found a long, uniform and uninterrupted usage of sawmills, and shingle, clapboard and planing mills to discharge their refuse into the streams, they would inquire whether the usage was essentially different from the defendant's practice. If not so different, they might consider such usage as competent evidence to be weighed with the other evidence upon the question of the reasonableness of the defendant's user. They were to enquire whether, under all the circumstances shown, and considering the equal rights

of the other proprietors, the use made by the defendant of the stream on his land by discharging into it the sawdust and shavings from his mill as he did, was a reasonable use within the meaning suggested; a use reasonably necessary and proper to his beneficial enjoyment of this stream, and consistent with the equal right of the plaintiff to a reasonable enjoyment of the stream; such a use as did not materially affect the plaintiff's power of lawful application of the water and the stream. If they found that the defendant made only a reasonable use of the water-course within the meaning suggested, he was entitled to a verdict; but if they found the use made by him was not such a reasonable use, the plaintiff was entitled to a verdict."

The jury having returned a verdict for the defendant, the plaintiff moved to set the same aside, because of these rulings and instructions of the court.

* * * * * * *

BELLOWS, J.: The charge was in substance that the defendant, being a riparian proprietor, was entitled to a reasonable use of the stream for manufacturing purposes; and whether it was a reasonable use to throw into the stream the sawdust resulting from the process of manufacture, was a question of fact for the jury; and in determining that question the jury were required to keep in view that the plaintiff had a similar right to the reasonable use of the stream, which the defendant could not lawfully infringe; and they were further instructed that, in deciding whether the use by the defendant was reasonable, they were to take into consideration all the circumstances of the case, including the size and character of the stream, the nature and importance of the use claimed and exercised by the defendant, together with the inconvenience or injury to the plaintiff.

To these instructions we think there can be no objection; on the contrary, they are sustained by the general current of authority upon that subject.

But the plaintiff urges that, in accordance with his request, the court should have charged the jury that the defendant had no right to conduct his sawdust and shavings into the river, if they did any injury to the plaintiff's lands below, and also, that he had no right to discharge them into the river, unless such discharge was necessary to the running of his mill; and it appears that the court declined to charge the jury in these terms, but did instruct them that each proprietor might use and apply the water, as it runs over his land, to domestic, agricultural, or manufacturing purposes, provided he uses it in a reasonable manner, and so as to work no actual or material injury to the others; and by actual or material injury is meant infringement of the right of others; and again, that the test is, not whether it produces some inconvenience or detriment to him, but whether it impairs the full and reasonable enjoyment of the stream that he is entitled to equally with the proprietor above.

Of these instructions we think the plaintiff has no cause to com-

plain; nor do we perceive any error in declining to give the instructions prayed for, in the terms suggested.

The instructions asked for were not correct without some qualifications; and, as we understand the charge, those qualifications were accurately stated.

The general principles that govern the use of running streams in respect to the abstraction, detention, or diversion of the water must also govern in respect to the deposit in the stream of waste matter and foreign substances resulting from the process of manufacture; namely, that a reasonable use may be made, and nothing more. What is such reasonable use in both cases is a question not of law, but of fact, depending upon the circumstances of each particular case. In respect to the former class of cases, it may be considered as well settled that in the use of a stream for domestic, agricultural and manufacturing purposes, to which every riparian owner is entitled, there may of right be some diminution, retardation, or acceleration of the natural current, that is perfectly consistent with the common right, and which is necessarily implied in the right to use it at all. Tyler *v.* Wilkinson, 4 Mason 397; 3 Kent Com. 572, and cases cited; Embrey *v.* Owen, 6 W. H. & G. 352. Such owner may even abstract and consume a portion of the water, for domestic purposes, for watering his cattle, and in some cases for irrigating his land, taking care not to interfere materially with a similar right in his neighbor. So, where the nature of the stream requires it, he may detain the water by his dam, to enable him to apply it usefully to manufacturing purposes, and then discharge it in the working of his mills, in quantities greater than the natural flow of the stream; but such use must be reasonable, and so as not to cause material injury or annoyance to his neighbor. What is a reasonable use must depend upon a variety of conditions, such as the size and character of the stream, and the uses to which it can be or is applied; and, from the nature of the case, it is incapable of being defined to suit the vast variety of circumstances that exist; but the rule is flexible, and suited to the growing and changing wants of communities.

As it is in respect to the abstraction, detention and diversion of the water, so it is and must be in respect to the deposit of waste, or other substances in the stream, as incidental to its use in the various modes before described. In many or most of these modes of use such deposits are to some extent necessarily made. In the construction and repair of mills and dams, in the excavations required for their foundations, and in the frequent removal of the gravel used for tightening such dams, the water must for a time, and necessarily, be rendered so impure as to cause inconvenience occasionally to persons engaged in a kind of manufacture requiring pure water. But if such building and repairs are reasonably conducted, the inconvenience must be borne just the same, and for the same reasons, as the inconvenience caused by the temporary and reasonable detention of

the water while filling the dam. So in the use of a stream for purposes of agriculture, such as washing sheep, crossing it with teams, allowing cattle and swine to traverse it,—the same principles will apply. So in the use of many kinds of mills, such as sawmills, fulling-mills, cotton and woolen factories,—there must be thrown into the stream more or less of the waste, such as sawdust, soap-lees, and other impurities, and no ordinary care or prudence could prevent it. In the other cases such disposition of the whole waste, although not absolutely indispensable, would add greatly to the productive value of the mill power.

Whether, in either case, it may be rightfully done must depend upon the question whether, under all the circumstances of the case, it is or is not a reasonable use of the stream; and in determining that question the extent of the benefit to the mill owner, and of inconvenience or injury to others, may, as stated in the charge, very properly be considered. So in respect to the size and character of the stream, it being obvious that an amount of diminution or pollution which would be insignificant in a large stream, might, in a small one, be wholly destructive of the common right. So also, in determining the reasonableness of suffering the manufacturer's waste to pass off in the current, much must depend upon the use to which the stream below can be or is applied; whether as a mere highway alone, or for purposes of manufacture, requiring pure water, or for the supply of an aqueduct to a large city, as in the case of the Croton river; and in respect to the lands below adjacent to the river, the character of the banks, whether they are usually overflowed or not in high water, should be considered.

In accordance with these views, and directly in point, is the case of Snow *v.* Parsons, 28 Vt. 459, which was an action on the case for obstructing the plaintiff's water-wheel by means of the spent tan bark discharged into the stream at the defendant's tannery; and it was held that the reasonableness of such use and the extent of inconvenience to which proprietors below must submit, was a question of fact for the jury.

The general views which we have stated are sustained by a great weight of authority, and among them, beside those already cited, are Merritt *v.* Brinkerhoff, 17 Johns. 306, which was elaborately discussed both at the bar and by the bench; and the court say (p. 320), that "the common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency." See also Hetrich *v.* Deachler, 6 Barr (Pa.) 32; Pitts *v.* Lancaster Mills, 13 Metc. 156; Blanchard *v.* Baker, 8 Greenl. 245; Arnold *v.* Foot, 12 Wend. 330; Sampson *v.* Hoddinnott, 1 J. Scott N. S. Com. Bench 590; 87 Com. Law; Ang.

on Water-courses, sec. 115, et seq., and sec. 120, et seq.; 3 Kent Com. 446, and cases, and Wason *v.* Sanborn, Rockingham county, June, 1861.

But it is urged that the court should have charged the jury, as requested by the plaintiff, that the defendant "had no right to discharge his sawdust and shavings into the river, unless such discharge was necessary to the running of his mills." The question, however, was not whether the acts complained of were necessary to the enjoyment of the defendant's right, in the sense that without them it could not be enjoyed at all, but whether such acts were done in the reasonable use of the stream; and of course in deciding that question the jury should consider the necessity or importance of the right claimed so to discharge the waste, as well as the extent of the injury likely to be caused to the plaintiff.

The plaintiff's counsel regards this discharge of the waste as an act by itself, distinct from the use of the mill, and likens it to the case of depositing the waste directly upon the plaintiff's land by means of teams or machinery provided for that purpose. To this view we are unable to assent, because the discharge of the waste into the stream, so far as it is reasonable, must be regarded as an incident of the right to use the stream for the manufacture which produces such waste, otherwise the act, if calculated to injure the proprietors below, could not be justified. In this respect it stands upon the same ground as the retardation or acceleration of the current in the proper and reasonable use of the mills.

Upon this point the court charged the jury to consider how far the use, if important, could be of practical value without the right claimed, and also the extent of the detriment, inconvenience, or injury to the owner below; and this we think goes as far as the plaintiff could rightfully ask.

The remaining question touches the admission of evidence of usage, as bearing upon the reasonableness of discharging the sawdust and shavings into the stream. There are cases where the customs and usages of trade may be proved to aid in the construction of contracts, and in defining the obligations arising out of such trade. 1 Greenl. Ev., sec. 292; 2 Stark. Ev. 453, 456, and notes; Dunham *v.* Day, 13 Johns. 40; Cutter *v.* Powell, 6 T. R. 320; Noble *v.* Kenoway, Doug. 510; Dolby *v.* Hiest, 1 B. & B. 224; Renner *v.* Bank of Columbia, 9 Wheat. 581.

But whether such customs and usages may or may not be proved to bear upon the question of reasonableness in a case not growing out of any contract, upon which we give no opinion, we are satisfied that the court erred in admitting the proof of usage in the case before us; upon the ground that the jury may be presumed to be already sufficiently informed as to what is a reasonable use of a water-course, as they are supposed to be as to what shall constitute a reasonable state of repair of a highway; Hubbard *v.* Concord, 35 N. H.

60; Patterson *v.* Colebrook, 29 N. H. 94; or what shall be considered a reasonable use of it by the traveler.

Our opinion therefore is that this does not belong to that class of cases concerning navigation, trade, or manufactures, about which the jury may be supposed to require the aid arising from the proof of customs or usages; but we think the admission of such evidence would be to open an extensive field of enquiry in this and similar cases, upon the same principle, that would tend greatly to increase the expenses of litigation, without affording in general any substantial aid to the jury.

The direction to the jury upon this point appears to have been based upon the highly respectable authority of Snow *v.* Parsons, 28 Vt. 459; but upon a careful examination of the authorities we are unable to reconcile it with the course of our own courts upon that subject.

There must, therefore, be a new trial.

McNAMARA *v.* TAFT

1908. Supreme Judicial Court of Massachusetts

196 *Mass.* 597, 83 *N. E.* 310, 13 *L. R. A.* (*N. S.*) 1044

A suit by Honora MacNamara against David N. Taft. From a decree for plaintiff for an injunction and damages, defendant appeals. Affirmed.

Knowlton, C. J.: The defendant owns a mill containing four sets of machinery for the manufacture of satinet cloth. It is upon a small stream which in its natural state is eight to twelve feet wide and from three to six feet deep. The mill is run in part by water power and in part by steam power. The plaintiff owns a farm containing about fifty acres of land nearly a mile below, through which the stream flows on its way to French river. This bill is brought to obtain an injunction against the pollution of the water by the discharge of noxious matter into it. The evidence shows that the defendant uses daily, at his mill, a large quantity of oil put upon the material before it is spun, and 180 pounds of soap, 165 pounds of soda ash, 45 pounds of soda salts, 200 pounds of extract of logwood and 43 pounds of blue vitriol in fulling and dyeing his cloth. After these chemicals are put into the fulling mill and taken up by the cloth, the cloth is placed in washers and washed. A large part of the logwood and vitriol, and substantially all of the other chemicals, are washed out and discharged into the stream. The effect of this discharge is to make the water dark in color and to give it an oily odor

and taste such as to prevent the plaintiff's cows from drinking it, as they are pastured on the banks of the stream below.

The case involves a consideration of the rights of riparian proprietors in regard to the pollution of the waters of a stream by the discharge into it of waste and other noxious substances in the use of it. This subject has often been discussed by this court and by courts in other jurisdictions. It was fully considered with a citation of many authorities in the recent case of Parker *v.* American Woolen Co., 195 Mass. 591. In that case as in the present, the stream under consideration was substantially unpolluted by manufacturing or other impurities, and was nearly in its natural state except for the acts of the defendant, and was not used under the authority of law for the discharge of sewage or other noxious substances, as some streams are which have been taken and appropriated to such a public use. The general rule is that every riparian proprietor on a stream has a right to have the water come to him in its natural condition, except so far as it is affected by the reasonable use of their property by the owners above. The doctrine of the decision in Merrifield *v.* Lombard, 13 Allen 16, 90 Am. Dec. 172, is correctly stated in the head note as follows: "The owner of land through which a natural stream of water passes has no right to use the water for such purposes as will corrupt it to the material injury of the riparian owners below." Chief Justice Bigelow says: "An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes in legal effect a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water." In Dwight Printing Co. *v.* Boston, 122 Mass. 583, the petitioner claimed a right to use the water in bleaching woolen and cotton cloths in such a way as to befoul it and render it unfit for drinking purposes. The court said that it has acquired no such right by prescription, and added: "It is well settled that, as a riparian proprietor merely, it has no such right." The two cases of Walker Ice Co. *v.* American Steel and Wire Co., 185 Mass. 463-471, and New England Cotton Yarn Co. *v.* Laurel Lake Mills, 190 Mass. 48-52, contain expressions in recognition of this doctrine. On the other hand there are cases in Massachusetts which recognize the fact that the water in a brook may lawfully be affected both in its quantity and quality by the legitimate use of an upper riparian owner. Merrifield *v.* Worcester, 110 Mass. 216-219, 14 Am. Rep. 592; Harris v. Mackintosh, 133 Mass. 228-231; Haskins *v.* Haskins, 9 Gray 390-392; Washburn & Moen Mfg. Co. *v.* Worcester, 153 Mass. 494-497. Ordinarily, the question whether the use of a stream by an upper riparian owner is reasonable is a question of fact. The reason why such a question is open, in many cases, is that certain uses of a stream which are universally recognized as lawful may diminish the quantity of the water or affect its quality to some extent. The watering of cattle may permanently abstract from the stream so much as they drink. The use of land for the pasturage of cattle may roil the

water as they pass through it if the banks and bed of the stream are muddy, or cause the dropping of excrement into it which will slightly affect its quality when it reaches the land of the next owner, just across the boundary line. The cultivation of land may cause earth to be washed into the stream. Such uses, carefully regulated, are not unreasonable, and the right of the owner below is subject to the exercise of these rights by the upper proprietor. But the questions of fact which arise in determining whether a use is reasonable are limited by certain rules of law. One is that a permanent diversion of a substantial portion of the water, to the detriment of an owner below, can not be found to be reasonable, although it may be convenient and profitable for the diverter. It is an invasion of a legal right. In like manner the discharge of a noxious substance into the stream in such quantity as materially to affect the purity of the water when it reaches the land of a lower riparian owner, if it interferes with his use of the water, is an invasion of his right of property, and as matter of law is unreasonable. But in a use of a stream, of a kind which is generally recognized among the people and in the courts as legal, a slight impairment of the quality of the water, which is necessary and incident to the use when properly and carefully regulated, is not unreasonable. These we think to be the rules that are deducible from the cases in Massachusetts and in other states. The case of Richmond Mfg. Co. *v.* Atlantic De Laine Co., 10 R. I. 106, 14 Am. Rep. 658, is much like the one now before us in its facts, and in it the right of the lower proprietor to have the water come to him unimpaired in its purity is stated strongly. The doctrine is reaffirmed in Silver Spring Bleaching and Dyeing Co. *v.* Waushusk Co., 13 R. I. 611, and Bradley *v.* Warner, 21 R. I. 36. The subject is considered elaborately in Lockwood *v.* Lawrence, 77 Maine 297, 52 Am. Rep. 763. It is said in the opinion that "any diversion or abstraction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows," etc. The same doctrine is laid down in Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335, and Middlestadt *v.* Waupaca Starch and Potato Co., 93 Wis. 1. See also, Chapman *v.* Rochester, 110 N. Y. 273, 1 L. R. A. 296, 6 Am. St. 366.

The cases of Snow *v.* Parsons, 28 Vt. 459, 67 Am. Dec. 723; Hayes *v.* Waldron, 44 N. H. 580, 84 Am. Dec. 105, and Red River Roller Mills *v.* Wright, 30 Minn. 249, 44 Am. Rep. 194, are among the most favorable to the contentions of the defendant. The first of these cases was an action for damages caused by the discharge of tan bark into the stream from a tannery above, the second was for

discharging sawdust and shavings from the defendant's mill into the river and the third for discharging sawdust and other refuse from a sawmill into the stream. In each it was held to be a question of fact whether the defendant's use of the stream was reasonable, and in each there is language on the subject which suggests a liberal interpretation of the law in favor of the user. It is to be observed that the cases were all very different from the discharge of noxious substances into a stream, materially affecting the purity of the water as it enters the land of a riparian owner below. The business of each of the defendants was of a kind which is universally recognized as legitimate in the use of a stream, and there was ground for a contention that the damage to the defendant was no greater than might result as an absolute necessity from this kind of use, under careful and proper management. The case of Snow *v.* Parsons, ubi supra, is considered and explained in the later case of Canfield *v.* Andrew, 54 Vt. 1, 41 Am. Rep. 828, in which the court says: "Such damages as are incident to and necessarily result from a proper use of the water must be borne. But the manufacturer has no right to do any act that in its consequences is injurious to others, because it is a matter of convenience or economy for him to do it. It is as much the duty of a manufacturer to so dispose of his waste as not to injure others as it is to refrain from injuring others by any other act. No one is allowed to deposit any substance in a running stream that will pollute its waters to the injury of a riparian owner below."

No discharge of noxious waste, in quantities sufficient noticeably or appreciably to affect the quality of the water in the lands of a proprietor at a considerable distance below, is shown to be necessary in the business of manufacturing cloth, however convenient or profitable it may be to the manufacturer. If filtering the water before returning it to the stream, after using it in the mill, is necessary to protect the rights of the lower riparian owner, or if chemicals or oils should be disposed of otherwise, the mill owner should make provision for it.

In view of its effect upon the use which the plaintiff desired to make of the water, there is no foundation for the defendant's contention that his discharge into the stream of oil, soap, soda, logwood, blue vitriol and other chemicals was reasonable. It was clearly proved that much of the time the plaintiff's cows refused to drink the water, and that thereby she suffered substantial loss and damage.

It is only when the owner in the stream below is materially affected in his right to use the water, by reason of its impurity as it enters his premises, that he has a remedy against the upper proprietor by whose use the quality of the water is impaired. For a slight impairment of quality, necessarily resulting from a reasonable use of the stream or of the land abutting on it, there is no liability. But the rules and principles so fully stated in Parker *v.* American Woolen Co., ubi supra, forbid the unnecessary discharge of polluting substances into a stream in quantities that appreciably affect the purity

of the waters when they reach the premises of a riparian proprietor below, and render them materially less fit for domestic or other uses to which they might be put there than when they came to the land of the owner who is charged with polluting them.

The evidence well sustains the findings, and there is no sufficient ground for the defendant's contention that the plaintiff is not entitled to equitable relief.

Decree affirmed.[8]

BARNARD ET AL. *v.* SHIRLEY

1893. SUPREME COURT OF INDIANA

135 *Ind.* 547, 34 *N. E.* 600

HOWARD, J.: Since May, 1886, the appellee has been the owner of certain lots and lands in and adjoining the city of Martinsville, occupied by her as a farm. Appellants are the owners of certain lots in the city of Martinsville, adjoining the lands of appellee. During the years 1887 and 1888, a well was drilled upon appellants' lots to the depth of eight hundred feet, in search of gas. Instead of gas, a large volume of water flowed from the well, and has so continued to flow ever since. The water having been found by analysis to possess curative properties for certain diseases, appellants erected a bathhouse upon their said lots, to be used for bathing persons afflicted with diseases who might be benefited by the artesian waters. On the 16th day of September, 1889, the appellee filed her complaint against appellants in the Morgan Circuit Court, alleging that appellants, after using said artesian water in bathing the bodies of diseased persons, the same having all manner of diseases, including syphilis, and after said water has become befouled and polluted thereby, caused the same to be conveyed in a tile ditch under ground, constructed by them, to the lands of appellee, causing such water to flow upon and over the lands of appellee and into a natural stream of water running thereon, causing said natural stream of water to become befouled and polluted thereby, exposing the same to the stock pasturing and feeding upon appellee's said land where said stock is accustomed to run, feed and pasture, such as milch cows, horses, and hogs, and the same drinking said water in its befouled and polluted condition as aforesaid. That said stream of water is a small spring branch of pure water, having its source in springs about one mile from appellee's land, and confined in a small channel upon appellee's

[8] See Wheatley *v.* Chrisman, 24 Pa. St. 298, 64 Am. Dec. 657; Canfield v. Andrew, 54 Vt. 1, 41 Am. Rep. 828; Wood *v.* Waud, 3 Exch. 748; Crossley and Sons *v.* Lightowler, L. R. 2 Ch. 478; Clark *v.* The Somersetshire Drainage Comrs.. 59 L. T. (N. S.) 670.

land, and passing through appellee's land the distance of fifty-three rods, and having no outlet, but sinking into the lands of appellee and others below. That said artesian water, in its polluted condition, so caused by appellants as aforesaid, and so caused to flow upon appellee's land, accumulates in great ponds of water upon appellee's said premises, becoming polluted and stagnant thereon, to the great and irreparable damage of appellee and her said land, and to the stock pasturing and feeding thereon; also endangering the health of persons living upon said land and drinking the milk from said cows. That said mineral water from said artesian well never at any time flowed upon appellee's land and into said stream of water, by percolation or otherwise, until the same was caused to flow thereon and therein by appellants in manner as aforesaid. Concluding with a demand for damages in the sum of $1,000, and praying that appellants be forever enjoined from causing and permitting said water from said well to run upon and flow over the lands of appellee, and into said stream of water, and for other proper relief. A demurrer having been overruled to this complaint, appellants answered by general denial, and also by special plea. There was a motion to strike out parts of the special answer, which motion was sustained. A demurrer was afterwards filed to the second paragraph of the answer, which was sustained. Appellants moved for a jury to try the cause, and also moved for a jury to answer questions of fact, both of which motions were overruled. To all of these rulings appellants duly excepted. The cause was submitted to the court, and the court, having heard the evidence, found for the appellee, assessing her damages in the sum of $50, and appellants were "enjoined from causing or permitting the water of the artesian well which shall have been used at their sanitarium and bathhouse * * * in bathing or washing persons afflicted with syphilis or other infectious ailment or disorder to flow into said branch or stream, or over and upon the lands of plaintiff, * * * and are further enjoined and restrained from polluting or corrupting the water from said well which may be left by them to flow into said branch and stream in such manner that the water of said branch and stream other than that flowing from said well may be rendered dangerous or injurious to live stock." A motion for a new trial was overruled.

Various errors are assigned and discussed, but the controlling questions in the case arise under the ruling of the court in sustaining the demurrer to the second paragraph of the answer. This paragraph of answer, omitting the parts stricken out as not material, or as being such as might have admitted of proof under the general denial, is as follows: "For further answer they [appellants] say that the stream of natural water set forth in plaintiff's complaint is a small stream and branch, which flows from sources northeast of the city of Martinsville, thence southward to near the center, north and south of said city, thence westward across said city, thence south to and across plaintiff's said land, and has so flowed for many years

prior to plaintiff's having any interest in said land. That the said well from which said waters flow upon the said lots of defendants was dug and bored and the flow thereof caused by an association of many citizens of said city of Martinsville, with the assent and approval of plaintiff. That the only means or way of escape of said water is in and along said branch over the said lands of plaintiff. That for more than one year after the said well was so dug and bored the waters therefrom flowed from defendants' said lots into said branch by open ditches, and were so caused to flow by the said association of persons who dug and bored the same, and without objection by plaintiff, and with her acquiescence. That thereupon and thereafter, upon testing said waters by scientific analysis, by drinking and using the same in baths, they were found to be of great value, and to have highly curative properties, and to be of great service and value in healing persons afflicted with various disorders, —rheumatism, neuralgia, kidney affections, paralysis, and many other disorders; whereupon defendants erected a bathhouse to utilize said waters for the benefit of all persons so afflicted upon their said lots at a cost of ten thousand dollars, and have treated, benefited, and cured hundreds of persons from all parts of the country so afflicted as aforesaid, and are still engaged at their said bathhouse in healing and curing such sick and afflicted. That in erecting said bathhouse and in using said waters of said artesian well for the healing of persons as aforesaid, and in all defendants did in the use of said waters and the draining the same away, as complained by said plaintiff, said defendants used all proper and possible care to avoid injury, damage, or inconvenience to said plaintiff and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid. That said plaintiff stood by and assented to and acquiesced in the said expenditure of said sum in the erection of said bathhouse by defendants. That, after so erecting said bathhouse, defendants placed under ground a drain, made of porous tile, to convey the surplus water from said artesian well under ground to the branch above plaintiff's land, because the said branch was the only natural and only convenient outlet for said water, and did not thereby materially increase the flow of water in said branch."

The question presented for decision is new in this state—whether one who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, is liable to injunction and damages for allowing the water to flow into a stream which is the natural water course of the basin in which the artesian well is situated, the owner being free from negligence or malice, and using all due care in avoiding injury to his neighbor. In a Pennsylvania case the plaintiff was the owner of property on one side of a street, and brought an action for damages for alleged injury to his property by the defendant company, which had constructed its elevated road on its own land, on the

The water may thus be rendered unfit for many uses for which it had before been suitable; but, so far as that condition results from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers, all the products and means of a high civilization, it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes. Merrifield *v.* City of Worcester, 110 Mass. 216. That it is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter, and that whether, in any given case, such use would be reasonable or not, is a question for the jury. See Ang. Water-courses (7th ed), sec. 140d.

In the case before us the stream flowed through the heart of the city of Martinsville before it reached the lands of appellee. Will it be said that there is any liability for contamination from the refuse of the city? Must it be that one who lives on the lower lands on the banks of a stream shall forbid forever the founding of a city on the lands above, forbid the grading of streets, the building of sewers, the erection of mills, factories, hospitals, or other means of livelihood, comfort, and convenience of the inhabitants? A case in many of its features resembling that now before the court is the well-considered case of Coal Co. *v.* Sanderson, 113 Pa. St. 126. That was a mining case, and the chief question was as to the liability of the mine owners for the flowage of foul water from the mine into a stream which was the natural water-course of the basin in which the mine was situated. The plaintiff in that case, Mrs. Sanderson, had purchased a tract of land in the city of Scranton, on Meadow brook, near its mouth. The existence of the stream, the purity of its water, and its utility for domestic and other purposes, it is said, was a leading inducement to her purchase of the land. She erected a house, threw dams across the brook to form a fish and ice pond and to supply a cistern, and the water was forced by hydraulic pressure from the cistern to a tank in the house, and was used for domestic purposes and for a fountain. The plaintiff alleged in her complaint that the large volume of mine water which the defendant company poured into the brook above had corrupted the stream to such an extent as to render it totally unfit for domestic use; that the fish were destroyed, the pipes corroded, and her entire apparatus for utilizing the water rendered worthless. She brought her action to recover damages for such pollution of the stream. In the course of the opinion the court says: "It must be conceded, we think, that every man is entitled to

the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream, in its natural flow, may reach his neighbor's land. * * * In sinking his well he may intercept and appropriate the water which supplies his neighbor's well. Acton *v.* Blundell, 12 Mees. & W. 324; Wheatley *v.* Baugh, 25 Pa. St. 528; Haldeman *v.* Bruckhart, 45 Pa. St. 514. Or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property. Whart. Neg. 939. So also, each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice may occur to the owner of the adjoining mine. Smith *v.* Kenrick, 7 C. B. 515. One mine owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. Bainb. Mines 297. To the same effect are Wilson *v.* Waddell, L. R. 2 App. Cas. 95; Crompton v. Lea, L. R. 19 Eq. 115. The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria,* for the rightful use of one's own land may cause damage to another without any legal wrong. * * * 'It is established,' says Cotton, L. J., in Iron, etc., Co. *v.* Kenyon, 11 Ch. Div. 783, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case Brett, L. J., says: 'The cases have decided that where that maxim (*"sic utere tuo ut alienum non laedas"*) is applied to land and property, it is subject to a certain modification; it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' Page 787. * * * The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to ownership of coal property, and, when exercised in the ordinary manner, and with due care, the owner can not be held for permitting the natural flow of mine water over his own land into the water-course by means of which the natural drainage of the country is affected. * * * The defendants were engaged in a perfectly lawful business,

in which they made large expenditures, and in which the interests of the entire community were concerned. They were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control. As the mining operations went on, the water, by the mere force of gravity, ran out of the drifts, and found its way over the defendants' own land to the Meadow brook. It is clear that for the consequences of this flow which by the mere force of gravity naturally, and without any fault of the defendants, carried the water into the brook, and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. * * * It is said that the defendants created an artificial water course from their mine to Meadow brook; but this artificial water-course was upon their own land, and conducted no more water than, by the natural conformation of the surface, could otherwise have reached it. If it be suggested that the defendants might have extended this artificial waterway, in form of a sewer, to some point of safety, it may be asked where, short of the sea, might the sewer be discharged that the same complaint might not be made? * * * Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands, or inflict upon him any other immediate or direct injury; but we do say that in the operation of mining in the ordinary and usual manner he may, upon his own lands, lead the water which percolates into his mine into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected."

The foregoing case of Coal Co. *v.* Sanderson, and the reasoning of the court, seem to be closely in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain, and discharged into a running stream, the natural water-course of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself. In both cases the owners were engaged in a lawful and necessary work, of great advantage to mankind at large, and particularly to the community in which they operated; the one in mining out of the earth and distributing coal for heating and industrial uses, and the other also taking out of the earth mineral water for healing and curing the infirm. Both were free from fault or negligence in conducting their business, and in avoiding, so far as possible, all injury to others; the injury in each case being but the necessary incident of a lawful business. In each case there was no other place but the stream for the water to go, so that, if it were unlawful to discharge the water into the stream, then the enterprise itself of necessity would be at a standstill, and a lawful business thus come to an end because it could not be lawfully carried on. It would seem that the decisions show that when a business is dangerous, unhealthful, or otherwise greatly injurious to a community

or to an individual, and it is possible to avoid the injury by a more careful management, or even, if necessary, by a removal of the works to a more secluded or less objectionable place, then the owners of the noxious business will be mulcted in damages, and, if necessary, restrained by the courts. * ** But the case before us does not belong to this class. Railroads must reach our cities and the marts of trade. They can not do business elsewhere. Mines and mineral springs, natural gas and oil wells, can not be removed. They must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and can not be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result notwithstanding such care in the management of the work must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good.

The demurrer to the second paragraph of the answer in this case admits the facts stated in the answer to be true. We have, then, to consider the statements of the answer as facts, and in the light of these facts examine whether the business of appellants is a lawful business, and whether it is carried on with due care, and so as to do no injury to appellee which can reasonably be avoided. From the answer, then, we learn that said artesian well was dug and its waters caused to flow upon appellants' said lands by an association of the citizens of Martinsville, with the assent and approval of appellee. That the waters from said well flowed into a stream, which, after running through said city, passed over the lands of appellee, and for more than a year so continued to flow, with the acquiescence of appellee. That the only means or way of escape of the water from said well is in and along said branch, which is the only natural outlet for the same; and that the increase of the flow of water in said stream was not materially increased by the water from said artesian well. That afterwards, by scientific analysis, and by the use of said water for drinking and bathing, it was discovered that the waters were of great medicinal value, and possessed of curative properties in the healing of persons afflicted with rheumatism, neuralgia, paralysis, kidney affections, and various other diseases; that thereupon, for the purpose of utilizing said waters in the cure of persons so sick and afflicted, appellants erected upon their said lots a bathhouse at a cost of $10,000, in which they have since continued to treat those affected as aforesaid, using said waters. It would seem from these statements that the business in which appellants are engaged is a lawful one. They sunk, or permitted to be sunk, on their own land, an artesian well. This they had a perfect right to do, and, in addition, it would appear that this work was done with the help of many citizens of the town, and with the acquiescence of appellee as well. Such help and

acquiescence, however, were not necessary to make the act of sinking the well lawful. It appears that the stream into which the waters flowed naturally from the well is a spring branch, which passes directly through the city before it reaches either the land of appellants or that of appellee. This stream is not only the natural outlet for the drainage of said land, but is the only means or way of escape of said artesian water. But was it lawful to build a sanitarium for the cure of the sick or to bathe in the waters those afflicted with disease? It was certainly lawful to do so, provided the sanitarium is properly conducted and well managed, so as to do no injury to any person which reasonably and with due care can be avoided. This court has already said: "Hospitals and homes for the sick are very far from being nuisances per se. They are wise and beneficient charities, to be fostered and encouraged by liberal legislation, and not to be suppressed, or even discouraged, by what may seem to be harsh or restrictive laws." Bessonies *v.* City of Indianapolis, 71 Ind. 189. But was due care exercised in the construction and management of the sanitarium and in the drainage of the waters therefrom? The answer states "that in erecting said bathhouse, and in using said waters for the healing of persons as aforesaid, and in all that appellants did in the use of said waters and the draining of the same away, appellants used all proper and possible care to avoid injury, damage, or inconvenience to appellee and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid; that, after erecting said bathhouse, appellants placed under ground a drain made of porous tile, to convey the surplus water from said artesian well under ground to the branch above appellee's land, because said branch was the only natural and only convenient outlet for said water." It would seem, therefore, that all due care has been exercised in the premises, and that the business is lawful, and that it is conducted in a lawful manner.

It is a question, also, whether appellee, having stood by and assented to and acquiesced in the expenditure of said sum of $10,000 in the erection of said bathhouse, is not now estopped from seeking to enjoin the continuation of its use. For over a year before this she had also acquiesced in the flowing of the artesian water into the stream, and now she could hardly be ignorant of the purpose for which the sanitarium was to be used. This court has held that, under certain circumstances, by remaining silent, and allowing acts to be done and expense to be incurred, persons may lose their remedy by injunction, and be compelled to assert their rights at law. City of Logansport *v.* Uhl, 99 Ind. 531, and authorities there cited. In New Jersey it was held that if a person "has given his consent, either expressly or impliedly, to the erection of expensive works, he can not afterwards enjoin their operation, though they prove more annoying or injurious than he anticipated." Hulme *v.* Shreve, 4 N. J. Eq. 116. We think the facts stated in the second paragraph of the

answer sufficient. The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

ON REHEARING

HOWARD, J.: * * * Counsel intimate, further, that it could be shown that the allegations made in the answer are not, in fact, true, and that appellants could have obtained an outlet by constructing a drain to another stream, and so have avoided injury to appellee. In answer to this, "it may be asked," as said in Coal Co. *v.* Sanderson, supra, "where, short of the sea, might the sewer be discharged, that the same complaint might not be made?" However that may be, appellee is in no condition to make such contention against the answer. If the averments of the answer were believed to be untrue, they should have been replied to, and the truth of the matter alleged be thus put in issue, and determined. Gilmore *v.* McClure, 133 Ind. 571 (decided at last term). Instead of this, however, appellee chose to demur to the answer, and thus to admit the truth of the facts therein pleaded. The facts alleged being thus admitted, the appellants ought to have judgment. We do not wish to be understood as holding that appellants were authorized, by artificial means, to conduct the waters from their spring into the stream upon appellee's land, unless the said waters would have naturally flowed into said stream without such artificial aid; and it was upon this interpretation of the answer that the opinion was written.

The petition for a rehearing is overruled.

Section 5.—Use Within Riparian Rights

HEINLEN *v.* FRESNO CANAL AND IRRIGATION CO.

1885. SUPREME COURT OF CALIFORNIA

68 *Cal.* 35, 8 *Pac.* 513

MYRICK, J.: Action to enjoin defendant from diverting the water of Kings river, and for damages for injuries to plaintiff's lands and cattle by reason of alleged prior diversion. The lands, averred and proved by plaintiff as being his lands, were swamp and overflowed lands, title to which was derived from the state by patents of separate parcels, issued at different times from November, 1870, to April, 1877. The plaintiff had judgment awarding the injunction and for $11,000 damages. Whatever may be the rights of plaintiff as a riparian owner, the judgment in this case will have to be reversed.

1. The court permitted plaintiff to prove title in himself to parcels of land not bordering on any stream. Taking the testimony offered by plaintiff at its best in his favor, there is no evidence of a defined channel or stream of water through any of plaintiff's lands except through sections 1, 12, 13 and 24, township 19 S., range 19 E., and across a corner of section 31, township 19 S., range 20 E. In addition to proof of title in plaintiff of lands in the above enumerated sections, the court admitted evidence of title in plaintiff of portions of sections 2 and 11, township 19 S., range 19 E., and portions of sections 1, 4, 5, 6, 7, 8, 9, 12, 16, 17, 18, 20, 21, 27, 28 and 34, township 19 S., range 20 E. The patents to these lands, in cases where patents had been issued, were of various dates, as above stated, from November, 1870, to April, 1877. Of these parcels some were at least five miles, others at least three miles, others at least two miles, and others at least one mile, from the stream; some were more than five miles, others more than two miles, from any lands of plaintiff bordering on the stream. Some, not bordering on any stream, were entirely disconnected by more than two miles in distance from any other lands of plaintiff. And in connection with such proof, the court permitted the plaintiff to give evidence of injuries caused by defendant's diversion to the lands, and to cattle pastured on the lands, not bordering on the stream.

2. The court permitted plaintiff to prove title to several tracts of land not set forth in his complaint.

3. The defendant pleaded five years' adverse diversion and appropriation; and its evidence tended to support the plea. The court did not find on this issue.

It is unnecessary to pass on the question of riparian rights, for the reason that, as the case must go back for a new trial, upon such new trial it may be found that there is no continuous stream through plaintiff's lands. The evidence offered on behalf of plaintiff is conflicting on this point. Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J.; Morrison, C. J.; McKinstry, J.

McKee, J. (concurring): Because the court erred in admitting evidence of damages sustained by the plaintiff upon nonriparian lands, and in awarding him damages for the same, I concur in the judgment.

DUCKWORTH ET AL. *v.* WATSONVILLE WATER AND LIGHT CO. ET AL.

1907. SUPREME COURT OF CALIFORNIA

150 *Cal.* 520, 89 *Pac.* 338

SHAW, J.: * * * It is claimed that the evidence does not sustain the findings. As to several of them, we think this contention is well founded.

1. There was an outlet to Pinto lake, through which water usually flowed from the lake during the rainy season of each year, but which was dry at all other times. One Grimmer owned a tract of land which abutted upon this outlet at a point some distance below the lake. On March 21, 1903, Grimmer conveyed to S. J. Duckworth "all riparian rights and other water rights and water" which he possessed in this outlet as appurtenant or belonging to this tract of land. This conveyance was made after the beginning of the action, but before the filing of the cross-complaint, and in his answer to the cross-complaint Duckworth averred that by virtue thereof he was a riparian owner to the waters of the lake. The court found, in accordance with this answer, that the plaintiff S. J. Duckworth "is a riparian owner of the waters of said Pinto lake, its tributaries and outlet," by virtue of this deed. Even if we consider the lake with its tributaries and outlet as forming one continuous stream of water, as the lower court found it to be, this finding is not technically true. Every owner of land upon a stream is, in some respects, interested in the entire stream. He has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land, and for the protection of this right, which begins only when the water reaches his land. He has a certain right with regard to all the waters of the stream above his land—the right to insist that it shall not be polluted to his injury nor diminished from use by other riparian owners above, so as to deprive him of his just portion, and, perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land. If nothing more than this was meant by the finding in question, we could not say that it was not supported by some evidence, nor that it was not a correct general statement of the right of Duckworth under the Grimmer deed. But the finding is that Duckworth thereby became a "riparian owner" of the waters of the lake, and it appears that, under it, he claims some right, as against the defendant water company, to take water from the lake for use, not on the Grimmer land, but on the Duckworth land, which abuts on the lake far from the outlet, and that not only during the rainy season, or at

such times as there is water flowing to the Grimmer land, but during all seasons, and when the outlet is entirely dry. The court below seems to have intended this finding to declare some such right. This claim is contrary to the doctrine of riparian rights, and to the general principles of law as well. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land, or point of diversion, respectively. This has been expressly decided with respect to appropriators. Parks M. Co. *v.* Hoyt, 57 Cal. 46; Riverside W. Co. *v.* Gage, 89 Cal. 418; McGuire *v.* Brown, 106 Cal. 670, 30 L. R. A. 384. The same rule applies to the riparian owner. As a riparian owner, Grimmer had no title to the water, except as it passed in front of his land and constituted the stream. The right or title to the stream as it passed was a part and parcel of his land, a part of the realty. See cases last cited. Being a part of his realty on his land, it was also part of the realty of other riparian owners at the points where it passed over their lands. Hence the title of each to the water exists only during such passage, and the right of each in the water during its course above consists only of the right to use such means as are necessary to preserve it until it reaches his land. Grimmer had the right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes. This right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation. When the stream ceased, and the channel became dry, he, for the time being, ceased to be a riparian owner, so far as a present use of the water was concerned. His land did not, at those times, border upon any stream. It did not then possess any natural right to the use of the water standing in pools or lakes at points above his land. During such dry periods, he could obtain the use of water from such pools or lakes only by convention with the owners of the lands abutting upon them. He would not have it by virtue of any right pertaining to his own land. Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose, upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not, by a transfer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water rights, except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed, except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any

use of such water which Duckworth might make to the injury of the Grimmer riparian right, as above defined. It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the defendants, or as against any one, except Grimmer and his successors in interest.

* * * * * * *

The judgment is reversed and a new trial ordered.

We concur: Angellotti, J.; Sloss, J.; McFarland, J.; Henshaw, J.; Lorigan, J.

CHARLES C. WILSON AND SON ET AL. *v.* HARRISBURG ET AL.

1910. SUPREME JUDICIAL COURT OF MAINE

107 Maine 207, 77 Atl. 787

WHITEHOUSE, J.: This is a bill in equity asking that the defendants be enjoined by both temporary and permanent injunctions from cutting and removing ice from the Androscoggin river opposite the shore of their property situated on the east side of the river above the main Central Railroad bridge in Lewiston. A temporary injunction was issued as prayed for, and the case comes to the law court on report for final determination.

December 24, 1867, the Franklin Company, a corporation organized under the laws of Maine and located at Lewiston, was the owner of land on both sides of the Androscoggin river in Lewiston and Auburn, including the land in question in this case owned by the defendants, and land on the opposite side of the river in Auburn. The plaintiffs claim title to the annual ice crop opposite the defendants' land by virtue of a lease from the Franklin Company for the term of twelve years from January 1, 1906.

The contention of the plaintiffs is that the Androscoggin river at the point in question is a floatable stream; that in 1867 the Franklin Company, from whom the defendants' predecessors derived their title by deed of December 24, 1867, was a riparian proprietor on both sides of the river at the point in question, and as such was the owner of the entire bed of the river between the two banks, and of all rights growing out of such ownership, including title to the ice forming over the bed of the stream.

It appears from the Franklin Company's deed to Bearce and Coe, the defendant's predecessors in title, that the land thereby conveyed is bounded from the point of beginning according to the following call in the deed: "Thence westerly by the northerly line of Avon

street extended about 491 feet to the outmost line or margin of the bank or shore of the Androscoggin river; thence up river by said line or margin to a point from which a line drawn parallel with the side line of High street extended would strike the point begun at." It is claimed that by this deed the Franklin Company obviously conveyed only to the top of the bank and retained in itself title to the bank of the river and the bed of the stream; and it is not contended that the defendants have any greater rights than their predecessors acquired by the above-named deed.

On the other hand, it is argued in behalf of the defendants that the Androscoggin river at the point in question is "navigable" in fact, and should be held to be "navigable" and a public river in the technical sense as at common law, though above the ebb and flow of the tide; that the title to the ice forming on it is in the public; and that whatever title the plaintiffs or the Franklin Company may have to the bank or the bed of the river, they have no greater right to the ice crop than the defendants or any other citizen of the state. But it is further argued that by the terms of this deed from the Franklin Company the defendants' ownership includes not only the bank, but the bed of the river, and extends to the thread of the stream, and that, even if their title does not go to the center of the stream, it is contended that in any event the defendants own the bank of the river and are riparian proprietors, and as such they, and not the plaintiffs, have the exclusive right to the ice crop opposite their land. Finally, it is contended in behalf of the defendants that, even if the plaintiffs have a superior title to the ice forming opposite the defendant's premises, the anticipated injury would not be irreparable, and that an adequate remedy for the trespass when committed would be first an action at law for damages, and not a bill in equity for an injunction.

1. The defendants' premises were situated above the Lewiston Falls, and the Androscoggin river at that point, being above the ebb and flow of the tide, was not a navigable river in the technical sense of the common law, but, upon the undisputed evidence in this case, it does appear to be navigable in a popular sense, or a floatable stream, according to the common law of this state. * * *

2. With respect to the rights of the riparian proprietor in floatable and nontidal streams, it is the settled law of this state that he owns the bed of the river to the middle of the stream and all but the public right of passage. * * *

But it is important to have a correct understanding of the force and meaning of the term "riparian proprietor," for it is obviously competent for a grantor of land owning to the center of a stream to fix the boundary lines and limit the grant as he may choose. If he wishes and intends to exclude the entire bed of the stream and all of the bank beyond a definite line on the top of it, he may undoubtedly do so by employing apt words to express his intention. * * *

But, in the opinion of the court, it is unnecessary to decide whether

or not the defendants' grant stops at the brow of the river bank or extends to the water's edge. It is only material to determine in this case whether or not the defendants' land extends beyond the water's edge so as to include the bed of the stream, and the court is clearly of opinion that it does not; the Franklin Company having retained in itself the title to the bed of the river.

4. The question respecting the ownership of the ice in the river at this point is but a corollary from the foregoing proposition that the bed of the river is owned by those under whom the plaintiffs claim title to the ice. "The right to take ice * * * results from and grows out of the title to the bed of the stream. * * * The plaintiff therefore has the sole right to take ice from the water resting upon his land." Stevens *v.* Kelley, 78 Maine 445. This is the settled doctrine of this state. It is recognized in the more recent cases of Barrett *v.* Ice Co., 84 Maine 156, 16 L. R. A. 774; McFadden *v.* Ice Company, 86 Maine 319; Wright *v.* Woodcock, 86 Maine 113, 25 L. R. A. 499. See also, Farnham on Waters, sec. 140. It is only the riparian proprietor in the full sense of the term, whose land is bounded by the river generally, and is thus made to include the bed of the stream to the middle thread, who has the right to take the ice in front of his land. The test of the title to the ice is the ownership of the soil over which it is formed. The defendants are not riparian proprietors in the full sense of the term. Their land does not in any event extend beyond the edge of the water. They do not own the bed of the river over which the ice is formed, and hence have no title to the ice. The plaintiffs Wilson & Son took from the Franklin Company by lease for twelve years from January 1, 1906, and the Lake Auburn Crystal Company, the other party plaintiff, acquired certain rights and interests by virtue of a bond for a deed from Charles C. Wilson, a member of the plaintiff copartnership of Charles C. Wilson & Son. At the time this bill in equity was commenced the title to the property was in Charles C. Wilson and Charles H. Wilson.

* * * * * * *

The taking of the plaintiffs' ice in the winter of 1908-09, and the construction of the ice slip as threatened by the defendants, would have involved a continuing trespass during that and each succeeding season, and the interference with the plaintiffs' established methods of business by the same acts would have been a continuing nuisance to the plaintiffs in depriving them of the enjoyment of their property rights.

For the injury to the plaintiffs occasioned by such a continuing nuisance in the complex situation disclosed by the evidence, the damages in an action at law would have been incapable of measurement by any accurate standard owing to the fact that the elements of reasonable certainty would have been wanting. The remedy at law would not have been as practical and efficient as in equity, but would have been incomplete and inadequate.

It is accordingly the opinion of the court that the plaintiffs' bill must be sustained with one bill of costs, and the temporary injunction be made permanent.

Decree accordingly.[9]

VENTURA LAND AND POWER CO. *v.* MEINERS ET AL.

1902. SUPREME COURT OF CALIFORNIA

136 *Cal.* 284, 68 *Pac.* 818, 89 *Am. St.* 128

The following is the opinion of SMITH, C., in department:

"This suit was brought to enjoin John Meiners, the original defendant, now represented by his executrix, and defendants sued by fictitious names, from diverting water from the San Buena Ventura river, and to quiet the title of the plaintiff to the waters of the river. * * * The general course of the river, or, rather, of the part of it represented on the map in the record, is from north to south. * * *

"The main question involved in the case is as to the finding of the court that the land of the defendant Meiners in the Ojai ranch and the Ramon Lopez homestead are not riparian. But this question with regard to the latter tract is immaterial, as it is found that the defendants are the owners of forty-five inches of water appropriated by the father of Lopez while the tract was still public land, which is more than it would be entitled to as riparian property. The question will be considered, therefore, as though referring to the Ojai ranch land only. The Ojai ranch is the older grant, but the Santa Ana ranch was first surveyed, and its east boundary constitutes the west boundary of the former. The location of this line, which is the first course of the Santa Ana patent, is not disputed. It runs northerly from the beginning point on the river,—a distance of about eight miles,—to station 2, at the Rancheria de Matilija, referred to above, which is apparently represented on the plat accompanying the patent as being on or near the river bank. Between these points the river is delineated as lying some distance to the west of the line. There is also in the record—put in evidence by the plaintiff—a larger map, made for the occasion, which shows in detail the topography of the stream and its environs. On this map 'the water channel' of the river, as it is called by the surveyor, and as we will call it, is represented by the blue strip; and it is claimed by the plaintiff that the elevations along the outer lines of the water channel, as thus delineated, are the

[9] See Lyon *v.* Fishmongers' Co., L. R. 1 App. Cas. 662; People *v.* The Canal Appraisers, 33 N. Y. 461; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. 183; Williams *v.* Fulmer, 151 Pa. St. 405, 25 Atl. 103, 31 Am. St. 767; Bigham Bros. *v.* Port Arthur Channel and Dock Co., (Tex.) 91 S. W. 848; revd. 100 Tex. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656.

banks of the stream; and the space between these, the river bed. But beyond these lines, at varying distances on either side of the stream, there are represented on the map continuous elevations, bounding the valley or river bottom. The latter are spoken of by several witnesses, and by the surveyor among others, as 'the high banks' of the river; and, to distinguish these from what may be called 'the low banks,' claimed by the plaintiff to be the banks of the river, we will make use of this expression. The precise question involved is whether the high or the low banks are to be taken as the true banks of the river.

"On the west side of the river the high and low banks very nearly coincide, and this is the case on the east side along the upper stretch of the river. But at a point somewhat above Matilija the banks commence to diverge, the distance between them at that point being about one hundred and fifty feet. Further down,—about a mile and a half,—at a point a little below the southwest corner of the Meiners tract in the Ojai ranch, the banks again come together; and, below this point, as far as shown by the map, or by the plat in the Ojai patent, they coincide, or nearly coincide. Between the two points described,—i. e., Matilija and the southwest corner of the Meiners' tract,—the two banks diverge more widely; the extreme divergence being at the present time something over two thousand feet. But five or six years ago the water channel was further east, and the extreme divergence only six or eight hundred or a thousand feet. The ground between the high banks is a low, level flat, in some places a little above, and in others a little below, the level of the bed of the water channel. The nature of the soil may be described, in general terms, as similar to that usually constituting the bed of a stream or water-course, or, more specifically, as variously expressed by the witnesses as 'gravel, sand and bowlders,' 'slickens,' 'wash land made by the river,' 'sand and wash,' 'river bed,' 'bowlders and stuff that wash down the river,' etc. Some parts of it are susceptible of cultivation, and some have in fact been cultivated. It is intersected by numerous lateral channels, through which the river flows in times of high water, shifting its channel at times from one to the other. Among these is a channel four to six feet deep, and forty to sixty feet wide, which enters and passes through the Ojai rancho, passing out of it at the southwest corner of the Meiners' tract. This is obstructed at its head by a bank of bowlders, over which in times of flood the water flows, as seems to have happened in the years 1884, 1885, 1886, 1889, 1892, 1893 and 1895. On some of these occasions the whole of the space between the high banks has been covered with water. The low banks of the river have an elevation of six or seven feet above the bed of the water channel, and are composed of the same material as the adjacent land; i. e., as bowlders, gravel, etc. Their location varies with the water channel, which shifts frequently from place to place. The natural tendency of such changes is to the eastern part of the bottom, which is the lower; but, owing to obstruc-

tions thrown up by the water, the actual change opposite the defendant's land has been to the west. The high banks of the river are about twenty-five feet high, and are of a permanent nature.

"In the above statement the description of the river and the land between the high banks is taken mainly from the map introduced by plaintiff, and the testimony of the surveyor, who was a witness for the plaintiff, and whose testimony is confirmed by the testimony of the witness Rice, the husband of plaintiff in the case of Rice *v.* Meiners, 136 Cal. 292. Both of these witnesses, it may be observed, claim the bed of the river to be the space between the low banks, but both also speak of the wider tract as the river bed,—as, e. g., the former, where he says, 'My map shows the width of the river bed there, from high bank to high bank'; and the latter, where he says, 'I saw a shaft sunk in the river bed, bottom land of Mr. Meiners on the Ojai ranch,' etc. These expressions, though otherwise of trivial importance, are significant as showing the impression naturally made on observers by the character of the ground. Some light might have been thrown on the question involved by the field notes of the surveys in the two grants, without which the plats are of but little significance, and by the decrees of confirmation, both of which are commonly recited in the patents of Mexican grants. But in the absence of these, the question must be determined by the general principles of the law applying to the subject.

"According to the most approved definitions, the banks of rivers or other water-courses are 'those boundaries * * * which contain their waters at their highest flow'; or, as otherwise expressed by the same judge, they are 'the fast land which confines the water of a river in its channel or bed, in its whole width,'—i. e., as determined by its highest flow. Howard *v.* Ingersoll, 13 How. 415, 417, 14 L. Ed. 189. This accords with the definition given in Stone *v.* City of Augusta, 46 Maine 137, to wit, 'By this term is understood what contains the river in its natural channel, when there is the greatest flow of water,' and also the definition in the Digest, cited in Ang. Water-courses, sec. 24, note 3, viz.: 'That is considered the bank which contains the river when fullest.' This definition seems to have been generally accepted. Kin. Irr., sec. 39, and note 43; Gould, Waters, secs. 41, 45 and notes; Long, Irr., sec. 32; Ang. Water-courses, sec. 24, and notes cited supra; Id. sec. 4; Palmer *v.* Waddell, 22 Kans. 355, and Earl *v.* De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395, there cited; Sparks Mfg. Co. *v.* Town of Newton, 57 N. J. Eq. 383, 384. In the case last cited it was said: 'I find it quite impossible to distinguish, in the matter of exclusive title and riparian right of user, between what counsel for the defendant classes as "freshet of flood water" and other water. They are all parts of the running stream, and, as such, become subject to the right of user by the riparian owner'; and further to same effect. The principle thus established is peculiarly appropriate to this state, where the changes in rainfall from year to year may be said to be periodical. The rule is, however,

to be understood as qualified by the principle that 'in general, in order to constitute a water-course, the channel and banks formed by the flowing of the water must present to the eye * * * the unmistakable evidences of the frequent action of running water.' Gould, Waters, sec. 264. The definition cited from Howard *v.* Ingersoll, supra, is taken from the leading opinion by Wayne, J.; but Judge Curtis gives a somewhat different definition, in which the character of the bed of the river is taken as the distinctive element of the definition, and the bed is defined as 'that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water.' 'In all cases,' he continues, 'the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality grows,' etc. But the case comes equally within this definition. Both definitions agree in holding that the bed of the river is bounded by the permanent or fast banks by which its waters are confined, and in this case there is but one set of banks that can be thus characterized. Where there is a question between two such banks, as, in the view of Judge Curtis, was the case in the decision cited, the considerations adduced by him should have a great, if not controlling, influence, though in fact, even on his own definition, it is not clear that the view of the majority was wrong. Judge Curtis concurred in the judgment. Judges Nelson and Grier dissented, but apparently on the construction of the grant involved, rather than on the question of definition.

"I advise that the judgment and order appealed from be reversed."

* * * * * * *

McFARLAND, J.: When this case was in department, the foregoing opinion was prepared by Commissioner Smith. Upon full consideration of the case, we are satisfied with that opinion and the conclusion then reached; and, for the reasons given therein, the judgment and order must be reversed. It may be observed, further, that this case differs materially from the ordinary case where a stream runs through a valley between rather low banks, which usually, but not always, contain its waters, and where the land adjacent to the banks differs in character from the bed of the stream, and is composed of arable and fertile land. In such a case the land which is sometimes overflowed by the waters from the stream does not have the characteristics of a river bed, and presents a condition very dissimilar to that of the land between what are called the "high banks" in the case at bar. The latter is similar in its general character to the part of the river bed lying within what are called the "low banks."

The judgment and order denying a new trial are reversed.

We concur: Temple, J.; Harrison, J.; Garoutte, J.

WARREN ET AL. *v.* WESTBROOK MANUFACTURING CO.

1893. SUPREME JUDICIAL COURT OF MAINE

86 Maine 32, 29 Atl. 927, 26 L. R. A. 284

EMERY, J.: This equity cause was heard on bill and demurrer. The case stated, independent of the legal inferences drawn, is substantially as follows: The Presumpscot river, a nontidal stream, as it flows through Saccarappa village, at the place called "Saccarappa Upper Falls," forms an island about 350 feet long and 150 feet wide. In forming this island the river divides itself into two branches or channels, one flowing on the easterly side and the other on the westerly side of the island. In each of these branches or channels are falls affording valuable water power. A dam has long been built across each channel. These dams are substantially in line with each other, and form with the island a continuous dam across the whole river. There are several mills on the island, and other mills on each side of the main river opposite the island. The mills on the eastern mainland and on the eastern side of the island are supplied with water from the dam across the eastern channel. The mills on the western mainland and on the western side of the island are supplied with water from the dam across the western channel. The bill does not expressly describe the mills and their location, but the facts are so well known and conspicuous that they may properly be added to the description of the general situation.

The plaintiffs, other than Mary Little Hale Dana, own the western side of the island, the land under the western channel, and the land on the west side of the river opposite the island. They also own the dam across the western channel, and the mills supplied by it.

Mary Little Hale Dana, one of the plaintiffs, has some interest on the west side of the river. She also owns the eastern side of the island and the adjoining land under the water, to the middle line of the eastern channel. She further owns so much of the dam across the eastern channel as is on her land, together with the mills on the easterly side of the island, supplied from this dam.

The defendant company owns the land on the east side of the river, opposite the island, and the adjoining land under the water, to the middle line of the eastern channel, or to the land of Mrs. Dana. It also owns so much of the dam across the eastern channel as is on its land, together with the mills on the eastern main shore which are supplied from this eastern dam.

All the plaintiffs are, therefore, the sole riparian owners on both sides of the western channel, and owning the land under that channel. Mrs. Dana is the sole riparian owner on the west side of the

eastern channel, and owning to the center line. The defendant company is the sole riparian owner on the east side of the eastern channel, and owning to the center line.

We are now to consider the various rights and duties of these different riparian owners in the flow of the water of the Presumpscot river to and past their lands. It should be continually borne in mind that we are considering the legal rights and duties based on the situation of the parties, and unmodified by any statutes, contracts, grants, or prescriptions. None of these latter matters are stated in the bill, and their possible modifying effects are not considered here.

As against other riparian owners up the river from them, they are all entitled to have all the water of the river flow down to their lands, to the extent it would naturally flow there, subject to a reasonable use of the flow by such upper riparian owners as it passed their lands. As against riparian owners below, they are entitled to have the water flow from their lands to the same extent. So far their rights are similar and equal, if not identical.

But at the head of the island the flow of water in the river is divided by the island. Part of the water thence flows through the western channel past the lands of the plaintiffs, and does not touch in its flow any of the land of the defendant, nor any of the land of Mrs. Dana on the east side of the island. The other part of the water thence flows through the eastern channel past the land of Mrs. Dana and the land of the defendant, and does not touch in its flow any of the land of the other plaintiffs.

The island, in thus dividing the flow of the waters in the river, has divided the rights of the parties to this suit. The plaintiffs are entitled to have flow through the western channel, past their lands on and under that channel, so much of the water of the river as would naturally flow there, and no more. The defendant and Mrs. Dana, on the other hand, are entitled to have flow through the eastern channel, past their lands on and under that channel, so much of the water of the river as would naturally flow there, and no more. As between the channels, neither party can lawfully do anything, by sheer dams, or by widening or deepening his channel, or by any other means, to cause a greater proportion of the water to flow through his channel. On the other hand, neither party is obliged to maintain dams or any other appliances on his channel to check the natural flow there, and thus turn more into the other channel. Either party may remove all existing dams from his channels, and leave the water to flow there naturally, unimpeded by artificial obstructions. This may lessen the hitherto accustomed flow in the other channel, but, as it would not lessen the natural flow there, it would not infringe upon any legal rights of the party on that channel. At the same time, if either party checks the natural flow through his own channel, by dams, closed gates, or otherwise, and thereby increases beyond nature the flow of water through the

other channel, the other party on that other channel can lawfully make use of such extra flow. He can lawfully use all the water that nature or other parties send to him. He is not bound to let it go to waste. In fine, either party, on his own channel, as against the other party on the other channel, may do as he will with his land, and the water flowing past it, through his channel, so long as he does not thereby cause a lessening of the natural flow through the other channel.

If, by reason of the greater natural width or depth or fall of one channel, a greater proportion of the water of the river flows through that channel than through the other, this greater proportion is the proper natural advantage of the party located on that channel. It is the proper natural advantage of the location, for which he presumably paid when he acquired the land on the more favored channel. It is an advantage he can not be required to share with the party on the other and less favored channel. Such other party can not avoid the natural disadvantages of his less desirable location. This inequality, when it exists, is natural—not legal. It is decreed by nature, and human courts are powerless to correct it.

The foregoing propositions seem almost elementary—not needing any citation of authorities to sustain them. See, however, 3 Kent, Comm. 428; Ang. Water-courses, secs. 16, 44, 49; Gould, Waters, sec. 166; Crooker *v.* Bragg, 10 Wend. 260; People *v.* Canal Appraisers, 13 Wend. 355, 371; Kimball *v.* Gearhart, 12 Cal. 29; Canal Co. *v.* Kidd, 37 Cal. 282; Fulmer *v.* Williams, 122 Pa. St. 191; West *v.* Paper Co., 82 Wis. 647, 655 et seq. Indeed, the plaintiffs, in their bill, have assumed the correctness of the main proposition. In the second paragraph of their bill, they state that they at one time sold the right to take a certain quantity of water power from their dam across the western channel. They apparently did this without consulting the riparian owners on the other channel.

Having considered the situation and consequent legal rights of the various parties in this suit, we now turn to the plaintiffs' complaint and prayer, as stated in their bill. These are based on the following assumptions, viz.: (1) That the defendant is entitled to only one-fourth of all the water flowing to and through both channels; (2) that the plaintiffs are entitled to three-fourths of all the water so flowing, and now desire and are planning to use it; (3) that the defendant, against the protest of the plaintiffs, has been drawing out of the dam across the eastern channel, and using to turn his mill on the east side of that channel, more than his one-fourth of all the water in the river. They admit, however, in the fifth paragraph of their bill, that they some time ago shut down a large sawmill on the westerly side of the western channel, which had been using a large quantity of water. This shutting down of the sawmill on the western channel undoubtedly increased the flow of water through the eastern channel. That the defendant used the increased flow thus voluntarily turned to it by the plaintiffs affords

them no legal ground of complaint, even upon their own assumption. But, however that may be, the plaintiffs say they now desire and are planning to use all the water and water power rightfully belonging to them, and want their three-fourths share of all the water of the river flowing to and through both channels ascertained and marked out for them.

Their prayer is that the court will make a division of the waters of the Presumpscot river at Saccarappa Upper Falls between the plaintiffs, on the one hand, and the defendant, on the other, and mark out for each party his share, and that to this end the court will cause skilled engineers to make surveys and measurements of the waters of the river (meaning all the waters flowing to and through both channels), and provide instrumentalities for determining and indicating each party's aliquot part or share of the water at all times.

As between opposite riparian owners upon the same channel, the court might have jurisdiction to equalize each owner's use of the water, and to mark out beforehand each owner's share, and this by any appropriate proceedings and instrumentalities. If Mrs. Dana, as riparian owner on the west side of the eastern channel, opposite the defendant, should desire such relief, it might, perhaps, be within the power of the court to act, and accomplish the desired result. Opposite riparian owners upon the same channel have a common and equal right to the use of all the water flowing in that channel as it passes their opposite lands. If the volume and flow of water be limited, the use by each opposite riparian owner may be limited by judicial action in proportion, so that the enjoyment be kept equal, like the right.

Where, however, the waters of a river are divided by an island, so that, as alleged in the bill, they flow past the island in two distinct channels, and where the island is itself divided in ownership, as also alleged in the bill, the riparian owners on the two main shores opposite the island are not opposite riparian owners, with common and equal right to the use of all the water flowing between them. On the contrary, each such owner has for an opposite the owner of that part of the island facing his land. Their equal and common right is confined to the flow of the water in the channel between them. They have no legal right, in common or in severalty, in the water naturally flowing between other owners on another channel, on the other side of the island, where they have no land.

The fallacy in the plaintiffs' reasoning is their assumption that because they own, among them, three shores out of four—that is, one main shore and the two island shores—they are, therefore, entitled to three-fourths of the water of the river flowing between the two main shores, without regard to the island. Indeed, we are urged to take a broad view of the subject—to overlook the island, and see one river, one current of water, one dam, one water power, with the defendant on one side and the plaintiffs on the other—

and then proceed to ascertain, determine, define and indicate each person's aliquot part of the whole water of the whole river. Should we do so, we must inevitably measure off to the defendant one-half of that whole flow. If there is only one current between him and the plaintiffs, his right in that current is equal to theirs. What the plaintiffs really seek to have us do is, not to overlook the island, but to notice it, and then assume that the two channels are equal and the two currents equal, and hence that the defendant is only entitled to one-half of one-half (i. e. one-fourth) of the water of the river. If the assumption be correct, there is no need for the court to intervene, further than to regulate the use of the flow in each channel by itself, in case the owners upon that channel are in conflict among themselves. The island has made a preliminary even division, which need not be re-examined. If, however, the assumption be incorrect, and one channel, say the eastern, is visibly wider, deeper, and with a better fall, than the other, then, as has been said above, the defendant, being a riparian owner on the eastern or larger channel, is entitled to one-half of the use of all the natural flow of water in that channel, even though it be three-fourths or more of all the water flowing down the river.

But we can not overlook the island. It is there, populous and conspicuous. Nature placed it there. She divided the waters of the river into these two channels by its means. Whether this division was equal, or extremely unequal, the parties found it already made when they located and invested there. They presumably accommodated themselves to that natural division. If they have not done so, they should. They may attempt to equalize matters to any extent by contract, but, if either owner refuses to yield his natural advantage of location, the court can not be expected to attempt to make equal what nature has made unequal.

It is particularly urged that, the two dams being in the same line, the island is only a part of one whole dam across the whole river, and should be so considered. When it is recalled, however, that Mrs. Dana and the defendant own the whole of the eastern dam, and could lawfully remove that dam, entirely, without consulting the owners of the western dam, it becomes evident there are two dams, instead of one. In the same way, it also becomes evident there are two water powers, instead of one. We are satisfied that the bill states no ground for the interposition of the court between the present parties. The plaintiffs have submitted their present case upon this bill, and the judgment must be that the bill can not be sustained. If there are any other grounds for relief between some or all of these parties, they can be stated and considered upon a new bill. This bill must be dismissed, with costs, but, out of abundance of caution, such dismissal should be without prejudice.

Bill dismissed, with costs, but without prejudice.

TURNER ET AL. *v.* JAMES CANAL CO. ET AL.

1909. SUPREME COURT OF CALIFORNIA

155 *Cal.* 82, 99 *Pac.* 520, 22 *L. R. A.* (*N. S.*) 401, 132 *Am. St.* 59

SHAW, J.: The defendants have appealed from the judgment and from an order denying their motion for a new trial.

There is no substantial conflict in the evidence upon any important fact in issue. The questions presented relate to matters of law applicable to the facts found and to the legal effect of the evidence. The plaintiffs each own a tract of land in Merced county riparian to the San Joaquin river; their combined holdings aggregating some 6,000 acres. They sue to enjoin the defendants from diverting water from said river. The defendant the J. G. James Company owns something near 20,000 acres of land which is riparian to a body of water called "Fresno slough." The defendant the James Canal Company, as successor to the defendant Enterprise Canal & Land Company, is the owner of a large canal beginning at a point on said river 30 or 40 miles above the junction of the river with Fresno slough, and extending over intervening lands belonging to other parties and not riparian either to the river or to Fresno slough, to and upon the lands of the J. G. James Company. The remaining defendants are lessees of portions of said land of the J. G. James Company. The J. G. James Company claims the right, as riparian owner on Fresno slough, to take from it a reasonable quantity of its waters to irrigate its said lands. As such riparian owner of lands on the slough, it also claims the right to a reasonable quantity of the water of the San Joaquin river to be used in the irrigation of its said land situated upon Fresno slough, and the right to take such water for that purpose at the head of its canal on the river, and carry it through the canal over the intervening nonriparian land, to the land on the slough. The court below adjudged that the defendants had no right to divert any of the water of the San Joaquin river at the head of said canal, or at all, for use on said lands of the J. G. James Company. With respect to the water of Fresno slough, the judgment is that the defendants have no right to use the same on the lands of said J. G. James Company, except such water as should flow into said slough from Kings river. It appears from the findings that water often runs into Fresno slough from the San Joaquin river, but the court held that the defendants had no right to the use of that water by virtue of the ownership of lands riparian to the slough.

Both the San Joaquin and Kings rivers have their sources in the Sierra Nevada mountains. The San Joaquin flows out on the plain of the San Joaquin Valley in a westerly direction by the station of

Herndon in Fresno county, to a point at or near its junction with Fresno slough, where it turns northerly and runs along the central part of the valley to an arm of the San Francisco Bay near Stockton. Kings river emerges upon the plain of the San Joaquin Valley some 30 miles southerly from the San Joaquin, and runs westerly to about the center of the valley, from which point its flow, in times of high water, depends upon differing circumstances. If the rivers from points further south have not filled Tulare lake, which lies to the south of Kings river, that river usually turns south and flows into the lake. If the lake is full, it turns northward, flowing along the center of the valley and into and along Fresno slough until it unites with the water of the San Joaquin river, and the two from thence form one stream to the bay. Sometimes, and especially at extremely high floods, Kings river divides, a part flowing into Tulare lake and a part to the north through Fresno slough to the San Joaquin river. Except at times of high water, Kings river does not reach Fresno slough or Tulare lake. Fresno slough is a somewhat crooked body of water about 14 miles long, extending from its connection with the San Joaquin river in a general southerly direction toward Kings river. Its width varies from 100 to 200 feet. The floods referred to come in the summer from the melting of the snows in the high mountains and, occasionally, during the winter season, from heavy rains. These rains occur at uncertain intervals, generally when water is not required or used in great quantity, and the floods from this cause are of minor importance to the parties interested in this case. The summer floods come each year during the months of May, June and July, and sometimes last as long as six or eight weeks. In some years they are not of sufficient volume to bring the water of Kings river to Fresno slough. The court finds that, at such times as the floods are sufficiently high to bring the Kings river water to Fresno slough, the waters of the two rivers often flow at different stages or elevations, and that, when the San Joaquin is the higher, a part of the water thereof flows or "backs up" into Fresno slough and runs southerly therein for some 14 miles to the south end thereof, until the slough is filled to the level of the river, or until it meets the rising water of Kings river coming into the slough from the south. Also, that the slough, when not fed from Kings river water, is kept filled by water from the San Joaquin, and rises and falls with that river. It necessarily follows that such current as there may be in the slough changes from time to time, flowing northerly when the San Joaquin river is falling and also when Kings river is the higher of the two, and southerly when the San Joaquin is rising, or when it is higher than Kings river. The court does not find the length of time of each season that it happens that the water of Kings river does not reach Fresno slough and when, consequently, the slough receives water from the San Joaquin river exclusively, nor does it find what proportion of the years this latter condition prevails during the entire year. It clearly

appears from the evidence, however, that this is the usual and ordinary condition, that seldom, during the dry season of any year, does Kings river water flow into Fresno slough for more than six weeks, and that, during that season, in some years it does not flow into the slough at all. It also appears that, when there is a flood sufficient to bring Kings river water to the slough, the San Joaquin is also very high, and the combined waters are of such volume that they are probably a menace rather than a benefit, overflowing, to their damage, the lands of both parties to this action, and that generally, at such times, the diversion of all the water that defendant's canal would carry would have no perceptible or appreciable effect on the volume of the water in the stream reaching the lands of the plaintiffs.

It is clear from these conditions that the privilege of using water from Fresno slough upon their lands during the very considerable period of each year, when there is no water from Kings river flowing therein, is one of great value to the defendants. The judgment forbidding such use undoubtedly will cause the defendants substantial injury. The theory of the plaintiffs is that the law of riparian rights, when applied to land bordering upon Fresno slough, does not include the right to take water from the slough for use upon the land, if such taking will diminish the flow in the San Joaquin river to the lands below the junction of the slough. It appears that during a considerable part of the time the water in Fresno slough is stagnant, and the plaintiffs argue that riparian rights in a body of water do not attach to lands bordering thereon except when the water consists of a flowing stream. The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits. Duckworth *v.* Watsonville, etc., Co., 150 Cal. 526. Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream.

There is no decision in this state upon the subject of the riparian rights of the owner of land upon a body of water not flowing. Nor is there anything in any of our decisions intimating that such rights do not exist. In Duckworth *v.* Watsonville, etc., Co., supra, the

question was suggested whether the right existed to make an appropriation of the waters of a lake, under the Code which refers only to "running water" (Civ. Code, sec. 1410); but, as it was held that the finding that there was a running stream was sustained by the evidence, there was no decision further than to hold that it was not necessary to a right of appropriation under the Code that the stream should run to the sea or to a junction with some other water course. This point has no bearing on riparian rights. It was also held that one owning land upon an outlet of a lake, but not on the lake itself, which outlet was dry for a considerable part of each season, could not take water from the lake above, during such dry period, to use on his land upon the outlet below. This was not, as counsel suggests, based on the fact that there was no flowing water in the outlet at such times, but on the fact that it then contained no water at all. Upon the assumption that riparian rights do not exist, except to water in a "water course," counsel cite authorities to show that in order to constitute a water course there must be water flowing, that it must flow in a particular direction, and that it must have a source and a mouth. As we have concluded that riparian rights do exist in a body of water not flowing, it is unnecessary to discuss the question of the things essential to a water-course.

No authority is cited in favor of the proposition that riparian rights exist only in flowing streams. After a somewhat exhaustive search, we have not succeeded in finding any decision to that effect.

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The plaintiffs seek to found a distinction upon the assumed fact that the waters of a pond or lake have no source of supply, and that if the riparian owner takes water therefrom, the water of such lake or pond will ultimately become exhausted. It is a mistake to suppose that a permanent pond or lake has no source of supply. There is a constant drain upon such a body of water by evaporation into the air and sometimes by seepage into the surrounding soil. If there were no supply the lake or pond would soon cease to exist; but even in a case of a pond or lake caused by an overflow, which has no other source of supply, and which by reason of seepage and evaporation will soon disappear, we think it must be conceded that the riparian owners have a right to the reasonable use of the water both for domestic purposes and for irrigation of the adjacent land. If such right does not exist, the water would disappear without advantage to any one; whereas, by the use thereof it might be made of great benefit to the adjoining owners. We can see no reason why the law should declare that in such a case all of the adjacent owners of land must abstain from taking any of the water and thus allow it to remain uselessly in its position until the forces of nature remove it.

The court finds, however, that Fresno slough is always connected with the San Joaquin river so that water will flow from the river

into the slough, or from the slough into the river, as one may be higher than the other at the particular time. Under the circumstances, we think that a person owning land abutting upon the slough has an equal right to take water therefrom, and an equal right to a reasonable share of the water, with another person who owns land abutting upon the main stream. In the case of any enlargement in the width of a flowing stream, it always happens that there is but little current at the sides, and in the case of an extensive enlargement there would be either a body of still water adjoining the flowing stream in the center, or there would be an eddy whereby a part of the water of the stream would flow back around the edge of the extension and enter the main channel again at the upper end thereof. No line could be fixed beyond which it could be declared that the water could not extend so as to carry riparian rights in the stream to the land along its borders. The only reasonable conclusion is that no such distinction exists, and that the rights of all persons owning land adjoining upon the stream, or upon any bay, inlet, or slough connecting therewith, are equal and coextensive with those of persons owning land bordering upon the main current or channel, regard being had, of course, to the quantity of land of each, their respective interests, the quantity of water in the slough, as compared to that in the river, the quantity the slough is capable naturally of diverting from the river, and all other circumstances affecting the question of a reasonable division of the water in case there should not be enough to supply the needs of all.

So far as the right to use a reasonable share of the water of Fresno slough for the irrigation of land riparian thereto is concerned, it is of no consequence how, or from what source, the water comes into the slough, or what causes or forces excavated the channel of the slough, provided both are the results of natural forces. The particular natural cause which made the excavation is immaterial to the question in any event. The source from which the water is derived becomes material only in determining what is a reasonable share of the water. While the water is running into the slough from Kings river, the slough is a part of that river, and the reasonable share of the water apportionable to the lands riparian to the slough is to be fixed by reference to the rights and needs of other lands riparian to Kings river. When Kings river does not run into the slough, the latter becomes a part of the San Joaquin river, with which it is then connected, and during that period the lands riparian to the slough are entitled to a share of the water of the whole San Joaquin river, including the slough. This latter right is the result of the fact that, while that condition prevails, the slough is really a part of the river, and the taking of water from the slough will affect the flow of the river, either by preventing by that much an addition to the main stream when that

stream is so low that the water will flow into it from the slough, or by drawing water into the slough from the river when the slough is lowered by the diversion. There is no more reason for declaring that the owner of lands on the river can prevent the owner of lands on the slough from taking a reasonable share of the water of the slough, although it may affect the flow of the river, than of holding that the owner of land on the slough could prevent the riverman from taking his reasonable part of the water of the river to the depletion of the water in the slough. One has as clear a right as the other to the natural advantages of his situation, and an equal right to complain of the deprivation thereof by the undue use of the other.

Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period each year, connected with, and properly a part of, the San Joaquin river, it follows that, for the irrigation of such lands, it has, during such periods, a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. The fact that it must carry the water from the river over intervening non-riparian lands, belonging to other persons, is of no consequence. The person over whose land it is carried could object, of course; but other riparian owners have no privity with such third person, and can not avail themselves of his rights. So long as the riparian owner takes no more than his reasonable share and uses it upon his riparian land, without unreasonable waste, other riparian owners below have no right to inquire how, or by what means, or at what place, he manages to divert his share from the stream, whether at a point on his own land or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, and whether by a dam and headgate, or by pumps and buckets. This principle was practically decided in Charnock *v.* Higuerra, 111 Cal. 479, 32 L. R. A. 190, 52 Am. St. 195, and Rose *v.* Mesmer, 142 Cal. 329. Its necessity is illustrated in the first-named case by the suggestion of the obvious fact that, unless the water can be obtained by a dam on land above, in many instances it could not be obtained at all, owing to the fact that the surface of the adjoining land is of necessity higher than the surface of the stream. To restrict the riparian right in such cases to the taking of water by pumps operating only upon the land where it is to be used would be to make it often practically valueless, and would be unreasonable. In Rose *v.* Mesmer it is said: "A riparian owner may, for the more convenient use of the water on his riparian land, go upon the land of another farther up the stream, with the consent of such landowner, and there divert the water for use upon the

land below, or he may raise it to the surface of his land by pumps or other artificial means."

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In such cases it may be that there will be an unreasonable waste of water by carrying it in open ditches subject to evaporation and seepage, and to that extent the method and place of diversion is a proper subject of inquiry in determining the comparative rights of different riaprian owners. As to the lands upon the stream between the place of diversion and the place of use, a different question is presented. It has been held that this particular diversion is unlawful, so far as it operates to the injury of such intervening land. California Pastoral, etc., Co. *v.* Enterprise Canal & Land Co. (C. C.), 127 Fed. 742. But no such question as this is presented here.

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It is clear from these principles that the J. G. James Company is entitled to a reasonable use of the water of the San Joaquin river on its lands riparian to Fresno slough, during the times when the slough is properly a part of that river, although such use may interfere with the natural irrigation of the plaintiffs' lands by the overflowing of the river during floods. To what extent such interference can be allowed without being unreasonable is a question of fact for the trial court, upon a consideration of the needs of each, the comparative benefits of the respective uses, the comparative injuries, caused to each by the deprivation ensuing from the use by the other, and all other circumstances bearing thereon. The court below held that the defendants were not riparian owners, that they had no right to any use of the water, and that the rights of the plaintiffs were paramount. In so holding the court erred, and for this error the judgment and order must be reversed.

The question of the right of plaintiffs to have the river maintained at its high flood level for the natural irrigation of their lands, as against an appropriator for public or private use on nonriparian land, is not here presented, and we express no opinion on the subject, mentioning it only to distinguish it.

The judgment and order are reversed.[10]

We concur: Angellotti, J.; Sloss, J.; Lorigan, J.; Henshaw, J.; Hall, J. pro tem.

[10] See Miller and Lux *v.* Enterprise Canal and Land Co., (Cal.) 147 Pac. 567.

BATHGATE ET AL. *v.* IRVINE ET AL.

1899. SUPREME COURT OF CALIFORNIA

126 *Cal.* 135, 58 *Pac.* 442, 77 *Am. St.* 158

CHIPMAN, C.: Action to quiet the title of plaintiffs, 275 in number, to the waters of Santiago creek, in Orange county, and for an injunction. Plaintiffs appeal from the judgment, from the order denying motion for new trial, and from certain parts of the order disallowing plaintiffs' costs. Defendant appeals from certain parts of this latter order.

Santiago creek takes its rise in high mountain elevations, on government land. It flows by a natural, well-defined channel through and over defendant's land, comprising about 48,000 acres; thence over and through a tract of land, about one mile in width, owned by persons not made parties to the suit; thence enters and flows over and through plaintiffs' lands, comprising in all about 2,000 acres.

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2. The court found, as conclusion of law, that defendant, as riparian owner, has the right to take water away from the watershed of the creek "for stock and domestic purposes" upon his lands which are riparian to the stream, to a point from which the water will not and can not return to the ancient channel of the creek, but has no right to so take it for purposes of irrigation. It was said in Chauvet *v.* Hill, 93 Cal. 407, that "no one by virtue of riparian ownership can rightfully divert water beyond the watershed of the stream from which he takes it." It is claimed by defendant that Chauvet *v.* Hill, supra, is not in point, because in that case the water was taken beyond the watershed for manufacturing purposes, and there would be a surplus, which, of course, should be returned to the stream, whereas, when used for domestic and stock purposes, the reason of the rule would not apply, because there would be no surplus water to return to the stream—it would all be consumed. For like reason, defendant claims that he may take the water beyond the watershed for irrigation, provided he consumes it all. On the other hand, it is contended that land situated beyond the watershed can not be said to be riparian, although part of a contiguous tract, some of which is riparian; that land which contributes nothing to the stream by drainage or seepage, but carries all its waters elsewhere to other streams, ought not to have the benefits attaching to lands which contribute by drainage and seepage to that stream; that, if the riparian owner may take water for any one use because he is such owner, his right to so take water for any other use, no matter what, must be governed by the same rule, and, therefore,

if he can not take it beyond the watershed for manufacturing purposes, neither can he for domestic and stock purposes nor for irrigation. The rule of the common law as to riparian rights, in its extreme rigor, has not been found to be adapted to the conditions existing in this state. At common law the riparian owner was limited in the use of the water of a stream to domestic purposes and watering stock, and might utilize it for power. We have added to these purposes that of reasonable use for irrigation, Gould *v.* Stafford, 77 Cal. 66, and other cases; but we are not aware that it has ever been held that water could be taken entirely away from the watershed for any of these purposes under the claim of riparian right. It is in evidence here (and the same situation frequently occurs in this state) that there is irrigable land within defendant's tract to which water may be profitably taken from Santiago creek where there is no outlet whatever to any stream, and which is not within the watershed of this creek. Water taken to this land, it is claimed, would be entirely consumed if used for irrigation or for domestic or stock purposes. If it be true, as defendant claims, that, where the water is consumed, it is immaterial whether it be within or without the watershed, the reason may be said to apply as well where the use is for irrigation as where it is for watering stock or domestic purposes. We think the rule should be that under the claim alone of riparian right the owner of the land can not, to the injury of another riparian owner, take the water beyond the natural watershed of the stream for any purpose, and that riparian rights can not extend beyond the watershed of the stream, and that lands so situated are not to be regarded as riparian. If it ever was a rule anywhere (which we doubt) that the riparian owner, under riparian right alone, could take the water of the riparian stream to any part of his land contiguous to his riparian land, to the extent of taking the water entirely away from the watershed of such stream, provided he there consumed it all, it is a rule inapplicable to our conditions, and should not be adopted here. The contention of defendant, carried to its logical conclusion, would make all the lands embraced in a large tract riparian to any one or more of the creeks flowing through it, at the pleasure of the owner, regardless of the lateral extent of the land, and regardless of the natural barriers which divide the entire body into distinct and separate drainage systems, each drawing its natural supply of water from distinct and separate sources. Such an interpretation of the law of riparian rights can find no support from any necessity existing in this state, and would, if adopted, lead to grave abuses, and would result in serious injustice to other riparian owners. "The word 'riparian' is defined as relating to the bank of a stream or other water—river, lake, or sea; as riparian proprietors, rights, states." Anderson Dict. The Latin word "ripa" means "shore of a river." Id. Now, can it be said that land whose watershed does not drain into a stream is riparian to such stream? Does it relate to the stream, or

in any sense form part of its bank? Can land be riparian to two creeks whose watershed is entirely different and have no drainage connection whatever? "The rights of a riparian proprietor, so far as they relate to any natural stream, exist jure naturæ, because his land has by nature the advantage of being washed by the stream." Lord Selden in Lyon *v.* Fishmongers' Co., 1 App. Cas. 662. But it can not be said that land lying beyond the watershed of the stream has any such advantage. We think the court erred in holding that defendant could take the water of Santiago creek beyond its watershed for domestic and stock uses, and did not err in holding that he might not do so for irrigation purposes.

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Per Curiam. For the reasons given in the foregoing opinion, the judgment is modified so as to enjoin defendant from taking water for any purpose whatever beyond the watershed of Santiago creek. As thus amended, the judgment is affirmed, with directions to retax the cost bill in accordance with the views herein suggested.[11]

ANAHEIM UNION WATER CO. ET AL. *v.* FULLER ET AL.

1907. SUPREME COURT OF CALIFORNIA

150 *Cal.* 327, 88 *Pac.* 978, 11 *L. R. A.* (*N. S.*) 1062

SHAW, J.: This is an action to enjoin the defendants from diverting water from the Santa Ana river. Judgment in favor of the plaintiffs as prayed for was given in the court below. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The plaintiffs own lands through which the Santa Ana river flows. They have been accustomed for many years to irrigate this land with waters from the river, and for that purpose there is required, during the irrigating season, a continuous flow of 400 miners' inches of water. The defendants, or some of them, own land on the river, situated above the land of the plaintiffs, and upon it they had built a dam in the river and were thereby diverting water from the stream, which, by means of a ditch, they were conducting to other lands owned by them and were there using it for irrigation. The plaintiffs claim, and the court found, that the land which the defendants were thus irrigating with water from the river was not riparian thereto. The sufficiency of the evidence to support this finding, and the question whether or not the plaintiffs' land is

[11] See Charnock *v.* Higuerra, 111 Cal. 473, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. 195.

entitled to riparian rights in the river, are the principal questions presented upon the appeals.

1. The defendants claim that the land of the plaintiffs lies within, and constitutes a part of the bed of the stream, and contend that such land is not riparian, nor, as such, entitled to the use of the water of the stream. It appears that the land consists of good soil, capable of producing valuable crops, that it abuts on the river, and that it has been successfully cultivated and irrigated by the plaintiffs and their predecessors for many years. The only facts upon which the claim that it is nonriparian is based are that it forms part of the wide bottom extending between higher lands or bluffs on each side; that the course of the river channel is subject to changes by unusual floods, although no substantial change has occurred for 40 years last past; and that the land is all underlaid by an underground flow, in contact with, and forming a part of, the surface stream. We are of the opinion that land thus situated is not to be distinguished from other land abutting on the stream, so far as the right of the owner to the reasonable use of the water is concerned. We know of no principle of riparian rights that would except such land from its benefits, nor of any decision to that effect. The opinion in Ventura L. & P. Co. *v.* Meiners, 136 Cal. 284, 89 Am. St. 128, contains nothing that can be so construed. It appears to decide that land may be riparian to a stream, although it does not abut thereon, except when the stream is swollen by floods. Without conceding the soundness of the decision so far as it seems to decide that the owner of such land may take water from the stream, at its ordinary flow, as against other owners whose lands abut upon such ordinary stream, we think it is clear that the discussion in the opinion as to the character of the ground lying between the edge of the stream at its ordinary flow, and the line of high water when in flood, has no reference to the right of the owner of such intervening land, as a riparian owner, to use the water of the stream for any useful purpose which his position upon the stream enables him to make of it. The land here involved was not at all similar to the land described in the opinion in that case. The case of Diedrich *v.* N. W. U. Ry. Co., 42 Wis. 264, 24 Am. Rep. 399, is not in point. It refers to the rights of the owner of land lying wholly under the bed of a navigable lake, and holds that such owner may not erect wharves or other structures thereon which would interfere with navigation, and that, in that respect, he has not the right of one owning land along the bank of such lake to erect wharves in aid of navigation for his own use. There is nothing in that opinion to indicate that the owner of land which was under the bed of an ordinary stream might not, by virtue of the position of his land, have such benefit from the water as he could get from it. This question, however, is not involved in the case at bar, for we are of the opinion that the plaintiffs' land was not in the bed of the stream in any proper sense of the term.

2. Some distance below the land of the plaintiffs a tributary, known as "Chino creek," enters the Santa Ana river. Chino creek also has a tributary, known as "Mill creek," which enters Chino creek 1½ miles above the confluence of the latter with the Santa Ana river. The defendants take the water from the river, above the land of the plaintiffs, in a ditch which extends across the low bottom to the high land or bluff, and then extends along the bluff, at a grade less than that of the river, gradually getting further above and away from the river until it reaches and crosses the divide, or summit of the elevated land, between the watershed of the river and that of Mill creek. The court found that the land irrigated with water from this ditch lies beyond this divide, and is wholly within the watershed of Mill creek, and that it does not abut upon the stream of the Santa Ana, and is not riparian thereto. Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. Chauvet *v.* Hill, 93 Cal. 410; Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. 158; Southern Cal. I. Co. *v.* Wilshire, 144 Cal. 68; Watkins L. Co. *v.* Clements, 98 Tex. 578, 70 L. R. A. 964, 107 Am. St. 653.

The defendants claim that these findings are contrary to the evidence, and that this rule does not apply to the land they seek to irrigate, because, while it is wholly within the Mill creek watershed, it is also within the general watershed of the Santa Ana river, considered as an entirety including the valley from its sources to its mouth. This fact does not affect the case, at least so far as the land of the plaintiffs is concerned. The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, with regard to lands abutting thereon above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed, or drainage basin, should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low table land, or "mesa," as it is called in the evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case. In some cases it may be difficult to distinguish the line of separation. This seems to have been a case of that sort. Nevertheless, we think there is evidence

sufficient to support the finding of the court that there is a dividing line between the two watersheds, and that the land irrigated by defendants lies upon the slope which descends into Mill creek. It is not necessary to discuss this evidence in detail.

The evidence also supports the finding that the land irrigated by the defendants does not abut upon, or extend to, the river. If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership. Boehmer *v.* Big Rock C. I. Dist., 117 Cal. 26; Alta Land Co. *v.* Hancock, 85 Cal. 229, 20 Am. St. 217; Lux *v.* Haggin, 69 Cal. 424; Watkins L. Co. *v.* Clements, 98 Tex. 578, 70 L. R. A. 964, 107 Am. St. 653; 2 Farnham on Waters, 1572, sec. 463a. All the land belonging to the defendants, including the Smith tract, which was in part irrigated, was originally a part of the Jurupa rancho, which abutted upon the river. The original owner of that rancho subdivided it by arbitrary lines, corresponding to the government surveys, and sold and conveyed it in parcels according to that survey. Under the rule above stated the conveyance by him of a tract not contiguous to the stream would sever such tract from the riparian interest and deprive it of subsequent participation in the use of the water of the river, the right to which previously attached to the entire rancho. The tract which includes the irrigated land of the defendants is not at any point contiguous to the river. At the time the action was begun it was owned by the defendant Smith. He was not the owner of any adjoining land which lay contiguous to the river. After the action was begun he conveyed this land to certain of the other defendants, some of whom owned adjoining lands extending from the Smith land to the river. This subsequent conveyance gave those defendants a continuous ownership of land extending from the river to and including the Smith land. This contiguous ownership, however, did not confer upon the Smith land the riparian rights of which it was deprived, when Smith, or his predecessors, obtained it by a conveyance which severed it from the portion of the Jurupa rancho abutting upon the river.

It seems to be contended that, for the purpose of determining what lands are riparian, the river is to be considered as including all the space through which its underground flow extends, as well as that occupied by the surface stream. It is claimed, and apparently conceded by the respondents, that the Smith tract, at one or two of its angles, extends into the low bottom under which the underground water flows or percolates, and upon this circumstance riparian rights are asserted to accrue. It is not necessary here to decide what rights

to the use of the underground flow of a stream may, by virtue of its position, attach to land which abuts upon, or extends into or over such waters, but does not extend to the surface stream. We are certain that such location of the land, with relation to the stream, does not carry the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from such surface stream, and there apply it to use on the latter, to the injury of lands which abut upon the proper banks of the surface stream, and hence that, even if the Smith land were within the watershed, such location upon the underground flow does not justify the diversion the defendants were making from the surface stream for use upon that tract.

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The findings support the judgment, and we are unable to perceive any substantial or material conflict in them. We find no error in the record.

The judgment and order are affirmed.

We concur: Angelotti, J.; Sloss, J.

BOEHMER *v.* BIG ROCK CREEK IRRIGATION DISTRICT ET AL.

1897. SUPREME COURT OF CALIFORNIA

117 *Cal.* 19, 48 *Pac.* 908

HAYNES, C.: This action is prosecuted by the plaintiff to quiet title to certain water rights alleged to be appurtenant to certain of his lands as riparian owner. The cause was heard upon an agreed statement of facts and the deposition of one witness. Written findings were filed, and judgment entered. The defendants moved for a new trial, and upon the hearing thereof the following minute order was made: "Defendants moved the court for new trial herein on the grounds stated in the notice of motion on file. Motion is argued, and thereupon granted on the grounds stated, and also on the court's own motion, for the reason that the findings are contrary to the evidence, and were signed and filed inadvertently by the court without observing the error, the same having been prepared by counsel for the plaintiff." This appeal is by the plaintiff from said order. Defendants' motion for a new trial specified three findings as not justified by the evidence.

* * * * * * *

Appellant also contends that his riparian rights extend to those quarter sections not on the stream, inasmuch as they are contiguous to those that are washed by it. As already seen, the fourth finding

obviously intended to limit plaintiff's riparian rights to those descriptions through which the streams run; but this intention was defeated by the third finding, and, the judgment having been entered in accordance therewith, the result is that all of plaintiff's tracts of land described in the complaint are adjudged to be riparian, except two quarter sections constituting the N. ½ of section 2 in township 4, range 10 W., and there is nothing in the findings to show that these parcels are differently situated. If appellant's contention as stated in his brief were sound, it would follow that, if A owned a tract of land upon a stream, his riparian rights which he acquired by the purchase of that tract would extend to all lands he might subsequently acquire, no matter from whom, nor under what circumstances his vendor obtained title, nor how distant from the stream, provided he owned all the land between the stream and the land so purchased. The facts stipulated are, however, that all the lands described in the complaint, except the N. E. ¼ of section 7, township 4 N., range 9 W., and two quarter sections in range 10, were patented by the United States to William S. Chapman on June 1, 1870, by 14 separate patents based on 14 different entries, and that plaintiff is the owner of each of these 14 quarter sections "by mesne conveyances under said William S. Chapman." With the exception of lands within confirmed Mexican grants, the Virginia military reservation and perhaps some other reservations, granted in early days, it has been the policy of the general government to subdivide the public domain into small tracts, and to dispose of them as such, and, for the purpose of carrying out such policy, it has restricted the right of entry under the homestead and pre-emption laws to 160 acres. Even in its grants to railroads, by granting alternate sections, it prevented the acquisition from the government of large bodies of contiguous lands, and a similar policy is pursued by the state in disposing of state lands. In Lux *v.* Haggin, 69 Cal. 255, at pages 424, 425, it was said: "It is to be borne in mind that if the court had found a water-course to, through, or past any one of the tracts described in the complaint, only such of the certificates of purchase would have been admissible as showed the purchase of tracts so found by the court to be touched or traversed by the water-course. * * * If we shall say, in general terms, that the certificates of purchase ought to have been admitted, this must be understood in a limited sense, and to apply only to the certificate with reference to the land described, as to which there is evidence that they are lands by or through which the water-course passed. All the sections or fractional sections mentioned in any one certificate constitute a single tract of land." In the case at bar the stipulation is that these 14 quarter sections were granted each by a separate patent, each patent being based upon a separate entry, and these 14 quarter sections therefore constitute 14 distinct tracts of land, and mere contiguity can not extend

a riparian right which is appurtenant to one quarter section to another, though both are now owned by the same person.

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Per Curiam: For the reasons given in the foregoing opinion the order appealed from is affirmed.

STRONG ET AL. *v.* BALDWIN ET AL.

1908. SUPREME COURT OF CALIFORNIA

154 *Cal.* 150, 97 *Pac.* 178, 129 *Am. St.* 149

ANGELLOTTI, J.: This action was instituted by Harriet W. R. Strong and Julius B. Cohn, the owners of certain parcels of land in the Rancho Paso de Bartolo Viejo, sometimes known and hereinafter designated as the "Ranchito," in Los Angeles county, against E. J. Baldwin and H. A. Unruh (who is simply an agent of said Baldwin and has no other interest in the subject-matter of the litigation), to obtain a decree enjoining them from interfering with plaintiffs in their use and control of a certain water ditch known as the "Rincon ditch," connecting with the San Gabriel river at a point on the Rancho La Puente, which is owned by Baldwin, and extending for a distance of about a mile on said Rancho La Puente to and into said Ranchito, and used by various property owners in said Ranchito for obtaining water for irrigation and domestic purposes, and also enjoining them from interfering with plaintiffs in the diversion of the waters of said river by means of said ditch.

* * * * * * *

The conclusion of the trial court, as shown by the judgment, was that plaintiffs and the cross-defendants are the owners of said ditch over the land of Baldwin, with the right as riparian owners to divert the waters of the river by means thereof to the extent of 450 inches measured under a four-inch pressure, and to conduct the same through said ditch to their lands and the lands of their co-owners in said ditch, for irrigation and domestic purposes, subject to the limitation that the right to the use of the waters to such extent is not to be construed as a prior or paramount right to the waters of said river or a prior or paramount right to take the same at the point of diversion, "except when such amount is not in excess of the rights of the owners of said Rincon ditch as riparian proprietors in the waters of the river." It was further expressly adjudged that all the parties, including Baldwin, are riparian owners on said river, and as such entitled to divert waters therefrom for use on their lands, "but nothing herein contained shall be construed as adjudging or determining the quantity to which either of them is entitled, or the

proportion of such water which either is entitled to divert or use as against the others."

This is an appeal by defendants from the judgment thus given, and from an order denying their motion for a new trial.

1. With respect to the question of riparian rights on the part of plaintiffs and cross-defendants, the findings of the trial court that all of such parties have riparian rights in the waters of the San Gabriel river are attacked as not being supported by the evidence. As we have seen, the land of some of these parties does not border upon the stream, but it does not necessarily follow that such land is without such riparian rights. When a tract of land abuts on a stream and a portion thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed in the stream may also be conveyed with the land, as is fully recognized in the case cited by learned counsel for appellants, Anaheim, etc., Co. *v.* Fuller, 150 Cal. 331, and, when so conveyed, is still a riparian right with all the attributes of such right, and is in strict technical language "parcel of the land" conveyed. The same is necessarily true where a tract of land abutting on a stream is partitioned in court proceedings among the owners thereof, and appropriate provision for riparian rights is made in the decree as to the portions allotted by the decree which do not abut on the stream. See Rose *v.* Mesmer, 142 Cal. 322; Verdugo Canyon Water Co. *v.* Verdugo, 152 Cal. 655. This is not a case, as suggested by appellants, of attempting to make riparian lands, which are not in fact riparian, but is simply the preservation of the right which the land has at the time of the conveyance or decree. In the case at bar the land of some of these plaintiffs and cross-defendants abuts on the stream, and as to such land there is, of course, no question. As to the land of the others, we think it sufficiently appears that the riparian rights were preserved. It is clear upon the record that at least a portion of each of such parcels has always been dependent for irrigation on the waters of said river, and has always been irrigated by means of said waters. All the original deeds of conveyance made by Pico for portions of the Ranchito which do not abut on the river contained either one or the other of two provisions regarding water. For instance, the deed of Pico to William R. Standifer and A. H. Dunlap, made May 13, 1875, purported to convey with the land "the same rights to the use of water that appertained to said land in the hands of the party of the first part," and the deed from Pico to plaintiff Harriet W. R. Strong, dated October 18, 1867, conveyed 320 acres of land, "together with the water rights and privileges as pertaining to the settlement of Pico, to wit: Sixteen water shares, representing the privileges to water for sixteen times twenty acres, paying for the same as water used in said settlement." In the light of the fact that these lands were then dependent for water on this river, there can not reasonably be any doubt that it was the intention of each of these provisions to preserve the riparian right of the land conveyed. The effect of such provision in the Pico

deeds was therefore, in each case to make the riparian right "parcel of the land" conveyed, and it passed as such in all subsequent conveyances of such land. As we have seen, the 3,785-acre tract conveyed by Pico to B. Cohn, and held by him in trust for himself, Broderick and Prager, abutted on the river, and therefore no special provision was necessary to carry the riparian right. So far as we have been able to ascertain from the records, no specific portion of this tract had been segregated by conveyance at the time of the partition decree. As already stated, that decree allotted with each parcel of land "all riparian rights and privileges," thus making the same "parcel of the land," as in the case of the conveyances from Pico. All of the plaintiffs and cross-defendants whose land does not abut on the river hold either under such deeds from Pico or under the partition decree. From what we have said, it follows that they are all riparian owners as to the San Gabriel river, even though their land does not abut thereon.

* * * * * * *

The judgment and order denying a new trial are affirmed.[12]

We concur: Sloss, J.; Lorigan, J.; Shaw, J.; Henshaw, J.

Section 6.—Is Damage Essential to a Cause of Action?

WILLIAMS *v.* MORLAND

1824. ENGLAND. COURT OF KING'S BENCH

2 Barn. and Cress. 910

Declaration stated, that the plaintiff, before the committing of the grievances thereinafter mentioned, was lawfully possessed of a messuage or dwelling-house, lands, and premises, with the appurtenances, and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a stream, called the Lee river, and which during all that time of right ought to have run and flowed, and until the committing of the grievances thereinafter mentioned, of right had run and flowed, and still of right ought to run and flow, unto and past the lands and premises of the plaintiff, for supplying the same with water; yet the defendant, well knowing the premises, but contriving, etc., heretofore, and whilst the plaintiff was possessed of the tenements, with the appurtenances, to wit, on, etc., at, etc., wrongfully and injuriously erected and made a certain pent-stock, dam, or floodgate, in and across the said stream, higher in the said

[12] See Copeland *v.* Fairview Land & Water Co., 165 Cal. 148, 131 Pac. 119; St. Anthony Falls Water Power Co. *v.* Minneapolis, 41 Minn. 270, 43 N. W. 56; Bristol Hydraulic Co. *v.* Boyer, 67 Ind. 236; Hall *v.* Ionia, 38 Mich. 493.

stream than the tenements of the plaintiff, and wrongfully and injuriously widened and enlarged a certain other pent-stock, dam, or floodgate, then being in and across the said stream, higher in the said stream than the lands and premises of the plaintiff, and kept and continued the said first-mentioned pent-stock, dam or floodgate so erected and made, and the said other pent-stock, dam or floodgate so widened, enlarged and altered respectively, in and across the said stream, for a long space of time, to wit, from thence hitherto and thereby unlawfully and wrongfully prevented the water of the stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner, unto and past the lands and premises of the plaintiff, as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity, unto and against the banks and premises of the plaintiff, and undermined, washed away, damaged, and destroyed the banks of the lands of the plaintiff, etc. The second count stated that the defendant wrongfully and injuriously stopped, hindered and prevented the water of the stream from running or flowing unto and past the tenements of the plaintiff, along its usual or regular course, and in its usual calm and smooth manner, as the same otherwise would have done, and also wrongfully and injuriously caused the water of the stream to run and flow in another direction with much greater force, violence and impetuosity, than it of right ought to have and would have done, in and against the lands and premises of the plaintiff, and thereby the banks and other parts of the lands and premises, etc., were damaged (as in the last count). Plea, not guilty. At the trial before Graham, B., at the last summer assizes for the County of Kent, the jury found that no damage had been done to the plaintiff's banks or lands either by the pent-stock set up, or that which was enlarged, but that their bad condition was owing to the plaintiff's neglect to repair them; and they added, that they thought the defendant should not stop the water in the summer-time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer-time. But the learned judge was of opinion, that inasmuch as the plaintiff in his declaration, did not complain that he was deprived of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his lands, whereby his banks were injured; and as the jury had found that the banks were not injured from such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was reserved to the plaintiff to move to enter a verdict, with nominal damages. A rule nisi having been obtained for that purpose in last Michaelmas term, Marryat and Bolland were to have shown cause, but the court called upon.

Chitty, in support of the rule: The jury have found, that the

defendant ought not to stop the water from coming in summer to the plaintiff's premises. The stoppage of that water of itself is an injury, although no actual pecuniary damage ensue. In trespass to land it is not necessary to prove any actual damage; and if special damage be alleged, it need not be proved. Here the second count stated, as the ground of complaint, that the defendant wrongfully prevented the water from coming to the plaintiff's premises; that of itself constituted an injury, and then it was unnecessary to prove the special damage alleged; and therefore the plaintiff is entitled to the verdict.

BAYLEY, J.: I think that this rule ought to be discharged. My judgment in this case is founded on the nature of flowing water, and the manner in which an exclusive right to it is obtained. Flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose. Here the declaration states a right to the use of this water at all times; but still, if the plaintiff had as much water as could be necessary for his purposes, the defendant would have been guilty of no wrong, by preventing additional water from coming to the plaintiff's premises. The gravamen of the plaintiff's complaint in his declaration is, not that the defendant prevented him from having the quantity which had formerly flowed to his premises, but that the defendant prevented the water of the stream from flowing along its usual course, in its usual, calm, moderate and smooth manner unto the plaintiff's lands, and that his banks were injured by the impetuous manner in which it was caused to flow, by the act of the defendant. Now the jury have found, that the banks, etc., were not injured by the manner in which the water flowed; and that being so, it appears that the plaintiff has not sustained the injury complained of in the declaration, and therefore the verdict is properly entered for the defendant.

HOLROYD, J.: I think the verdict was properly entered for the defendant in this case. Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there, it clearly was not his property. It may, perhaps, become, quasi, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it. Thus in Bealey *v.* Shaw, 6 East 208, the defendants or those under whom they claimed had appropriated to themselves a quantity of the flowing water of the river Irwell, sufficient for the purposes of working their mill. The plaintiff afterwards erected premises lower down

the stream, and appropriated to himself the surplus water for the use of his works. Four years after the plaintiff had erected his works, the defendants widened their sluice, so that nearly double the quantity of water was drawn from the stream, and the plaintiff's works were thereby materially impeded. It was held in that case, that although the defendants might originally have appropriated the whole water to themselves, yet they could not do so after the plaintiff had appropriated the residue of the unappropriated water to himself. If the plaintiff, therefore, in this case, had shown in his declaration a right to the unappropriated water of the stream, and had alleged as the ground of his complaint that he had been deprived of the use of that surplus water, he might then have been entitled to a verdict. But the present declaration is framed to meet a different case from that now relied upon. The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank, by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should show the loss of some benefit, or the deterioration of the value of the premises.

LITTLEDALE, J.: I think that the plaintiff is not entitled to have the verdict entered for him in this case. The first count does not allege that the plaintiff was deprived of any benefit to which he was entitled, but that his banks were injured by reason of the water having been caused to flow in an impetuous manner. The jury have found that his banks were not thereby injured, and therefore the proof has not supported that count. The second count does not allege that the plaintiff was deprived of the use of the water, but that the defendant wrongfully prevented the water from flowing past the lands of the plaintiff along its usual course, in its usual calm and smooth manner, as the same ought to have done, and that his lands were thereby injured. It is true, that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right, is a sufficient cause of action. The doing of any act calculated to injure that right is a sufficient ground of action, but, generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case. Now, assuming

that the stopping of the water was a wrongful act of the defendant, has the plaintiff thereby sustained any temporal loss or damage. He alleges that he has sustained a damage, by his banks having been injured in consequence of the water flowing in a more impetuous manner. He does not allege that he has sustained any damage by the actual loss of the water. The jury have found that he has not sustained the damage alleged; and, therefore, they have negatived the ground of action stated in his declaration. Water is of that peculiar nature, that it is not sufficient to allege in a declaration that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water. The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, per se, give him any right of action. All the king's subjects have a right to the use of flowing water, provided that, in using it, they do no injury to the rights already vested in another by the appropriation of the water.

Rule discharged.

ROBERTS *v.* GWYRFAI DISTRICT COUNCIL

1899. ENGLAND. SUPREME COURT OF JUDICATURE. CHANCERY DIVISION

L. R. 1899, 1 *Ch.* 583

The plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, known as Brynygro mill, in the parish of Llanllyfni in the County of Carnarvon, and he claimed as riparian owner and occupier of the same to be entitled to the natural flow of a stream that ran past his mill from a lake called Llyn Cwmdulyn situate at the foot of a mountain some distance above the mill, the stream being utilized for driving the mill. The plaintiff also claimed that, whenever necessary for the purposes of his mill, he was entitled, in times of drought and scarcity of water in the stream, to dam up the water of the lake as a reservoir so as to ensure a sufficient supply of water to the mill.

In May, 1893, the defendants, who had obtained a lease of the lake from the Crown and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying certain villages in their district with water, and applied to him for his written consent thereto under sec. 332 of the Public Health Act, 1875, 38 & 39 Vict. ch. 55, but he refused to give such consent. Thereupon the defendants, without any further notice, laid down pipes, and under, it was said, a license granted by the Crown in 1896, constructed a dam across the end of the lake—of which the

stream in question formed the natural outlet—so as to increase the water storage, a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works.

The plaintiff then, on March 30, 1898, issued the writ in this action for an injunction to restrain the defendants, their servants and agents, from taking any of the water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants, as lessees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done or were intending to do anything whereby the flow of water in the stream past the plaintiff's mill had been or would be diminished or so as to cause any damage to the plaintiff.

The action now came on for trial with witnesses. It was admitted at the trial that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also, that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply instead of an intermittent one, which the plaintiff admitted sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled, as of right, to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

It was admitted by the defendants' witnesses that the supply of the district would cause the abstraction of about one-sixteenth of the water in the lake.

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KEKEWICH, J., held that, so far as the plaintiff's claim was founded upon the ground of prescription, it failed; and that, therefore, so far as the costs had been increased by that claim the plaintiff must pay those costs, whatever might be the result of the case generally, such costs to be taxed as between solicitor and client. His lordship then proceeded:

With regard to the rest of the case, it raises an entirely different question. The defendants, in the exercise of what they conceive to be their duty and within their powers, utilized the waters of this lake by constructing certain works which are admitted at present to be properly constructed with a view of supplying the district with water. It is not suggested that the plaintiff will be any worse off now than he was before: probably he will be better off in the future than he has been in the past. The supply may not be the same, but it will be sufficient, and will be apparently more constant than it has been before, since the evidence shows it to have been of an intermittent character and sometimes very much less than was required

for the purposes of the mill. But the plaintiff says, "I am entitled to insist upon having what I had before. It is immaterial whether the supply of water I had before is better or worse than what is now proposed to be given to me. It is for me to consider whether I shall derive any benefit from the alteration. I protest against any alteration at all." Several cases have been referred to, but I intend to refer only to one of them in which occurs a passage to which Mr. Renshaw called my attention. The law on this subject has been threshed out again and again, and I do not think any advantage would be gained by my going through the authorities. A riparian proprietor or owner is entitled to say that the water which flows by his property and which is used by him for ordinary, or it may be for extraordinary, purposes shall flow in the future as it has done in the past—*debet currere ut currere solebat.* That seems to me to be the common law right; and unless that common law right has been affected by statute he is entitled to insist upon it. But there is one passage in Lord Cairns' speech in the House of Lords in the case of Swindon Water-works Co. *v.* Wilts and Berks Canal Navigation Co., L. R. 7 H. L. 697, which, Mr. Renshaw says, instead of being in the plaintiff's favor is against him. I do not so read it. What Lord Cairns says is this, L. R. 7 H. L. 705: "Therefore, my Lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do." That is the qualification. "I put this qualification, because, if, when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the court of chancery found * * * that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration."

What I understand Lord Cairns to mean is that, there being no sensible damage, an injunction or declaration would not have been granted unless the appellants had insisted upon what they were doing as a thing they were entitled to do as a matter of right. From which I should conclude also that, as they did insist upon it as a matter of right, whether damage was incurred or not, the respondents were entitled to an injunction or declaration. That, as I understand, is the meaning of his lordship's observations, and what he means by the qualification, and what he deduces from it. Therefore it seems to me that, unless the defendants have some higher authority by statute (prescription being out of the question) to interfere with the flow of water, they have no right to alter the flow even although the alteration may cause no sensible damage to the plaintiff. He is entitled to have his water flowing as it did before, and so far I am entirely in his favor.

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The result is that, in my opinion, the plaintiff is entitled to an injunction, and to the costs of the action as between party and party, the defendants to have their costs, as between solicitor and client, on the question of prescription. The two sets of costs will be set off one against the other. The injunction will be a perpetual injunction to restrain the defendants, their servants, agents and workmen, from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream and through and by the plaintiff's mill and lands shall be diminished.

WOOD *v.* WAUD

1849. ENGLAND. COURT OF EXCHEQUER

3 Exchequer Reports 748

POLLOCK, C. B.: * * * The first question to be disposed of is, in what way the issue on not guilty is to be found, so far as it applies to the first and second counts, which are framed to recover damages for obstructions and injuries to the natural water-course, the Bowling Beck.

It is conceded by the plaintiffs' counsel, that the verdict must be found for the defendants, on the plea of not guilty on the second count. It is conceded by the defendant's counsel, that it must be found for the plaintiffs on so much of the general issue as relates to the heating of the water. The only question, therefore, on this issue is, whether the remainder, which relates to the fouling of the water, is to be entered for the plaintiffs or the defendants.

The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream, by pouring in soap suds, woolcombers' suds, etc.; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of millowners above the defendants' mills, and by dyers still further up the stream, and some sewers of the town of Bradford; that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the water-course flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighboring landowners.

This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must be entered for the plaintiffs on every part of not guilty to the first count.[13]

NEWHALL *v.* IRESON

1852. SUPREME JUDICIAL COURT OF MASSACHUSETTS

8 *Cush.* (*Mass.*) 595

This was an action on the case to recover damages for a diversion of a part of the waters of a natural water-course; and was submitted to the court upon the following statement of facts:

The land of the plaintiff is situated on the south side of a highway in the city of Lynn, called Boston old road. The water-course crosses the highway running from the north of it opposite the plaintiff's land, and runs on the south side thereof, between the wall of such land and the traveled part of the highway, several rods, and then, turning to the south, runs between the plaintiff's land on the east and the defendants' land on the west into a creek below. The northern boundary of the plaintiff's land is described in a deed from Joseph Ballard to Thomas Newhall, the plaintiff's father, under whom she claims title, as "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first mentioned bound." The seven rods terminate on the north at the old wall which formerly constituted the southern boundary of the road, and the water-course is wholly north of the old wall and within the southern half of said highway; and one question submitted to the court is, whether such boundary can be construed to extend to the middle of the highway.

The defendants own a piece of land next west of the plaintiff's land, upon which they have erected a mill or factory, and also another piece of land on the north side of the highway above the plaintiff's land and wholly easterly of the place where the water-course crosses the highway, which last piece of land the defendants have excavated and formed into a pond for the use of their mill. The

[13] The statement of facts and arguments of counsel are omitted. Only part of the opinion is given.

water-course runs through this last mentioned piece of land and pond and a dam has there been built across it by the defendants.

The defendants, under the authority of an act of the legislature passed on the 3d of May, 1850, St. 1850, ch. 285, put down a pipe or culvert, leading from their pond along and across the highway, to their mill, agreeably to the conditions and requirements of the act, so far as the size of the pipe and the manner of placing it in the ground are concerned. The defendants have since occasionally drawn water through the pipe, but at no time in such quantity as to prevent the plaintiff from using it in any manner in which she has ever been accustomed to use it.

Nominal damages only are claimed by the plaintiff.

* * * * * * *

SHAW, C. J.: Two questions are presented in this case. The first is whether the plaintiff has title to the half of the highway, along which the stream in controversy runs; if she has, it being conceded that the brook lies wholly south of the middle of the highway at that place, it must of course for some extent pass wholly through the land of the plaintiff.

* * * * * * *

Perhaps this point is not very material to the present case, because it is conceded, that from the highway it runs exclusively through the plaintiff's land; but as it is made, and as perhaps it makes the result more clear and satisfactory, we have examined it with the above result.

2. Taking this to be so, the defendants, by excavating an artificial pond or reservoir, on their own land, on the north side of the road, and placing a dam across the brook to raise the water in that reservoir, and thence by a culvert or pipe taking the water from the reservoir, along and across the road and into their own land, and conducting it thence to their mills, from which it is dscharged into the salt water below the plaintiff's land, have effectually diverted a large portion of the entire volume of the water of the brook from the plaintiff's land.

This was an unwarrantable and injurious use of a common right to a water-course, running in its natural channel, through the lands of several different proprietors. The rule of law is well settled, that each of such proprietors has a right to a reasonable and beneficial use of the current as it passes through his own land; but he has no right to divert or corrupt it, so as to prevent the proprietor below him from having and enjoying the same use, for all usual and beneficial purposes. This substantial diversion of the water-course, therefore, was unwarranted by any right of the defendants, as proprietors above, was an encroachment on the rights of the plaintiff, and prejudicial to her estate. And although the plaintiff has sustained no present damage, because she has had no mill upon it, or otherwise used it for any agricultural or manufacturing purpose, yet such diversion would prevent such beneficial use of it hereafter, and thus

impair the value of the estate. It is therefore a case where an action can be maintained to vindicate the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time.

Even where it has been considered that a riparian proprietor had authority to make use of the stream for purposes of irrigation, and thus by that use divert a portion of it, it has been held under the condition, that such diversion was, under all circumstances, a reasonable use of the stream, and that the surplus of the water thus used must be returned into its natural channel. These cases carry a strong implication, that a diversion of the entire stream, or of a considerable part of it, is prejudicial to the proprietor below, and not justifiable. Weston *v.* Alden, 8 Mass. 136; Colburn *v.* Richards, 13 Mass. 420; Cook *v.* Hull, 3 Pick. 269; Embrey *v.* Owen, 6 Welsb. Hurlst. & Gord. 353.

3. We have not considered the act of the legislature as having any effect on the rights of the plaintiff. It seems to have been made *alio intuitu*, and solely as a license to the defendants to make a certain use of the highway, which would otherwise have been a public nuisance.

Judgment for the plaintiff for $1 and costs.

ELLIOT *v.* THE FITCHBURG RAILROAD COMPANY

1852. SUPREME JUDICIAL COURT OF MASSACHUSETTS

10 *Cush.* (*Mass.*) 191

SHAW, C .J.: This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz.: of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land, through various other lands to Nashua river. Said brook was in part supplied by a never-failing spring, on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water, from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and

for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of water to the brook; and it was further proved that there is no outlet for the water of said meadow, except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion, the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook, equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right, in both particulars.

This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose lands it passes, as are held to apply to other water-courses, subject to this consideration, that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses for farm-yards, and watering-places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in water-courses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question,

depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is therefore, to a considerable extent, a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream, for purposes of irrigation. But this, we think, is an abstract question which can not be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor can not under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump—for the mode is not material—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation, will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such, that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use, and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts, on this subject. Weston *v.* Alden, 8 Mass. 136; Colburn *v.* Richards, 13 Mass. 420; Cook *v.* Hull, 3 Pick. 269; Anthony *v.* Lapham, 5 Pick. 175.

This rule, that no riparian proprietor can wholly abstract or divert a water-course, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle, that the right to the reasonable and beneficial use of a running stream, is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally bene-

ficial enjoyment of the common right, by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration or retardation of the natural current, it would follow, that each lower proprietor would have a right of action against any upper proprietor, for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor, in entering the close of the upper, to abate it. Colburn *v.* Richards, 13 Mass. 420.

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream, without an encroachment on another's right, subjecting him to actions *toties quoties,* as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua river, would have the same; and because the quantity of dimunition is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack river to the ocean. This is a sort of *reductio ad absurdum,* which shows that such can not be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated. Bealey *v.* Shaw, 6 East, 208; Duncombe *v.* Randall, Hetley 32; Williams *v.* Morland, 2 B. & C. 910, 4 Dow. & Ry. 583; Wright *v.* Howard, 1 Sim. & Stu. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it, has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor, for which an action will lie. Mason *v.* Hill, 3 B. & Ad. 304; 5 B. & Ad. 1; Wood *v.* Waud, 3 Welsby, Hurlst. & Gord. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the court of exchequer. Embrey *v.* Owen, 6 Welsby, Hurlst. & Gord. 353.

The right to the use of flowing water is *publici juris,* and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land; so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwar-

rantable use, an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited; "so long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

We think the most reliable American authorities are to the same effect. 3 Kent Com. (6th ed.) 439; Angell on Water-courses, Ch. iv.; Blanchard *v.* Baker, 8 Greenl. 253; Tyler *v.* Wilkinson, 4 Mason, 397; Webb *v.* Portland Manufacturing Co., 3 Sumner 189; Anthony *v.* Lapham, 5 Pick. 175.

The same doctrine has been held in a recent case in New York. Van Hoesen *v.* Coventry, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right, and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find, whether the defendants claiming in the right of Clark, had by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and if not, to find for the defendants. It is very clear that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth, or relied on. The bed of the stream and the stream itself remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether, in the mode of taking, in the quantity taken, and the purpose for which it there was taken, was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff, and, therefore, we think that question of fact was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether the improvements of Clark upon his meadow, taken together as a whole, including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this we think was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands, bounding on running streams, by the general rules of law

and for general purposes, that some alterations of these rules may be effected in Massachusetts by the acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative acts. This system originated with the provincial act, 13 Anne, passed in 1714, Ancient Laws and Charters, 404. This act by its operation necessarily secures, to some extent, advantages to the prior occupant of a stream, by a dam erected to work a mill. Bigelow *v.* Newell, 10 Pick. 348; Bemis *v.* Upham, 13 Pick. 167; Baird *v.* Wells, 22 Pick. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon, or affected by the mill acts. Exceptions overruled.

ULBRICHT *v.* EUFAULA WATER CO.

1889. SUPREME COURT OF ALABAMA

86 Ala. 587, 6 So. 78, 4 L. R. A. 572, 11 Am. St. 72

SOMERVILLE, J.: The purpose of the bill, which was filed by the complainant, Ulbricht, is to enjoin the appropriation of the water from a running stream, diverted by the defendant corporation for the use of its water-works, constructed to supply the inhabitants of the town of Eufaula. The complainant owns land on both sides of this water-course, and so does the defendant, each being a riparian proprietor. The grievance complained of is that the defendant, an upper riparian owner, by the construction of a dam and a reservoir, and the diversion of so large a quantity of the running stream, is guilty of an unlawful act prejudicial to the rights of the complainant, as a lower riparian owner on the same stream. The testimony fully establishes the diversion of the water for the purpose mentioned, resulting in a sensible diminution in the flow of the stream, at least in the dry season or summer months. It further shows, however, that the complainant was making no particular use of the stream, having no mill or other industry on it, and therefore that he suffered no special damage by the act of defendant. The chancellor was of opinion "that the owner below ought not to be permitted by injunction to hinder the owner above from the consumption of water which the former can not and does not use." An injunction was nevertheless granted, "perpetually restraining the defendant from the consumption of the whole or any part of said stream for the use of said water-works in supplying the city, to the sensible injury or damage of the complainant, for any purpose for which he may now or in the future have use for said water."

The defendant was also enjoined from backing any portion of the water of the stream on the lands of the complainant to an extent damaging to him. The chancellor admitted the right of the complainant also to prevent the defendant from so using the water as to acquire an easement by an adverse user of any or all the water of the stream for supplying said water-works, and the complainant is declared to be entitled to the reasonable use of the flowing waters of said stream, as against the defendant, whenever he shall need it. It is our opinion that there is no error in this decree, and that it secures to the complainant all that to which he is equitably entitled in this suit.

1. To divert or unreasonably obstruct a water-course is a private nuisance, actionable at law. The jurisdiction of equity to interfere in such cases by injunctive relief, to prevent irreparable damage and avoid a multiplicity of suits at law, is clear and well established, the remedy at law being deemed inadequate. Burden *v.* Stein, 27 Ala. 104, 3 Pom. Eq. Jur. sec. 1351; Gardner *v.* Newburgh, 7 Am. Dec. 526; Lawson *v.* Wooden-Ware Co., 59 Wis. 393; Gould, Waters, sec. 215.

2. The complainant is shown to have sold to the defendant the acre of land upon which the reservoir and dam were constructed for this specific purpose, reserving to himself all easements and riparian rights in the other lands owned by him, including the water-rights and privileges. This reservation retained in the grantor nothing which he would not have retained without it, as the right of water in the other land was appurtenant to the land itself as a part of the realty, and could not have been affected by the conveyance to defendant. Cary *v.* Daniels, 41 Am. Dec. 532, 538.

3. There is no principle of law better recognized than that every riparian owner of lands, through which streams of water flow, has a right to the reasonable use of the running water, which is a private right of property. The right is one annexed and incident to the freehold, being a real or corporeal hereditament, in the nature of an easement, and must be enjoyed with reference to the similar rights of other riparian proprietors. It is, therefore, a qualified, and not an absolute, right of property. Gardner *v.* Newburgh, 2 John. Ch. 161, 7 Am. Dec. 526, and note, 531-534; Ang. Water-Courses, sec. 5; Tied. Real Prop., sec. 614; Wadsworth *v.* Tillotson, 15 Conn. 366; Boone, Real Prop., sec. 141.

4. The general rule is often stated to be that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes; or, to state the rule in the words of Shaw, C. J., in Cary *v.* Daniels, 8 Metc. 477: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the

usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below." We will not enter into a general discussion of this phase of the case, as it is not necessary to a decision of the question before us. It is exhaustively discussed in the following authorities, which we cite merely, without review: Stein *v.* Burden, 29 Ala. 127; Burden *v.* Stein, 27 Ala. 104; Stein *v.* Burden, 24 Ala. 130; Davis *v.* Getchell, 50 Maine 602, 79 Am. Dec. 636, and note, 638-645; Dumont *v.* Kellogg, 29 Mich. 420; Elliot *v.* Railroad Co., 10 Cush. 191; Crooker *v.* Bragg, 10 Wend. 260; Gould, Waters, secs. 213-215.

5. In this case the defendant has diverted the water from the stream, and consumes it for the purpose of supplying the wants of a neighboring town. The diversion is rendered unlawful by the fact that it is for an extraordinary or artificial use, and is not restored to its natural channel, where it is accustomed to flow. The authorities speak with one voice in sustaining the proposition that no person has a right to cause such diversion, and that it is a wrongful act, for which an action will lie by the lower riparian proprietor without proof of any special damage. The injury done the complainant in such a case is an invasion of his general right to have the water-course flow in its natural channel, through his lands, operating to interrupt a possible water-power, or to suspend an agency capable of imparting fertility to the soil through which it passes, or other damage of a general character. Parker *v.* Griswold, 17 Conn. 288. In all such cases, however, the plaintiff can recover nothing more than nominal damages, unless he shows affirmatively that he has suffered some special damage. The case of Stein *v.* Burden, 29 Ala. 127, may be considered as settling this particular question, having been before this court on three separate appeals. Stein *v.* Burden, 24 Ala. 130, 27 Ala. 104. It was decided in these cases that a riparian proprietor is entitled to nominal damages for any disturbance of his right by diversion of the waters from the stream, without returning them to the natural channel, although he offers no evidence of actual or special damage. The diversion there, as here, was for the purpose of supplying the inhabitants of a neighboring city (Mobile) with water through the medium of a system of water-works. "The law," it was said by Goldthwaite, J., "in the absence of any special injury, gives nominal damages (for the invasion of every legal right) on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into evidence of a right to do them." 24 Ala. 148. The action is allowed as said in Newhall *v.* Ireson, 8 Cush. 595, to vindicate the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time. The cases are numerous in support of this view, and of the reasons upon which such decisions are made to rest. As said in Parker *v.* Griswold, 17 Conn. 302.

"They proceed upon two grounds: First, that every injury, from its very nature, legally imports damage; and, secondly, that an injury to a right is a damage to the person entitled to that right, by jeopardizing its continuance, and leading to its very destruction." In other words, the license to interrupt the right, if acquiesced in for twenty years, would become conclusive of its renunciation by the complainant, by presumed grant or otherwise, under the doctrine of prescription; the defendant's exercise of it being regarded as conclusively adverse, and having ripened into a good title by lapse of time. The mere non-user of a water-power by a riparian owner will not operate to impair his title, or confer any right thereto on another. He has a legal right to have the stream to continue to flow through his land, irrespective of whether he may need it for any special purpose or not. This principle we fully recognize. Garwood *v.* Railroad Co., 83 N. Y. 400; Pillsbury *v.* Moore, 44 Maine 154; Blanchard *v.* Baker, 23 Am. Dec. 504; Gardner *v.* Newburgh, 2 Johns. Ch. 161, 7 Am. Dec. 526, note, 532; Plumleigh *v.* Dawson, 41 Am. Dec. 199; Cary *v.* Daniels, Id. 532; Dilling *v.* Murray, 63 Am. Dec. 385.

6. If the complainant had made proof of the fact that he had suffered any special perceptible damage by the diversion of the water in question, or that he was making any use of it, or that it was of any particular value to him, we may admit, for the sake of argument, that irrespective of any question of estoppel, which we do not consider, he would be entitled to an injunction perpetually restraining the defendant from a continuance of his wrongful act of diversion. City of Emporia *v.* Soden, 37 Am. Rep. 265; Garwood *v.* Railroad Co., 38 Am. Rep. 452; Gould, Waters, sec. 214. But inasmuch as he is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, and it appears to be of no special value to him, he will not be permitted to call for equitable interference in his behalf, further than to vindicate his right, and prevent a loss of it by adverse user and lapse of time. A court of equity will use its discretion, in such case, not to interfere by injunction, but leave the complainant to his remedy at law. Smith *v.* City of Rochester, 92 N. Y. 463; Corning *v.* Nail Factory, 40 N. Y. 220, per Woodruff, J.; Clinton *v.* Myers, 7 Am. Rep. 373, 379.

In Garwood *v.* Railroad Co., 83 N. Y. 400, the bill was filed to prevent a railroad company, as riparian owner, from diverting water of a running stream by pipes and reservoirs, for the use of its locomotive engines, to the detriment of a lower proprietor, who was a mill-owner, and who claimed that the diversion diminished the grinding power of his mill. The defendant was restrained only "from diverting the water to the injury of the plaintiff." Upon appeal by the plaintiff, the judgment was affirmed by the New York Court of Appeals. See, also, Earl of Sandwich *v.* Railroad Co., L. R. 10, Ch. Div. 707. The principle of this and other analogous decisions is that the extraordinary process of injunction will be used by the

court of chancery only so far as it is necessary to vindicate or enforce valuable rights of parties litigant, and will ordinarily not be allowed, where the injury sought to be restrained is only trivial in its nature.

It is our opinion that the aid of injunctive relief was carried by the chancellor's decree as far as it ought to be, in view of the facts of this case. It fully protects the complainant from injury, present and future, resulting from the use of the water by the defendant,—a privilege of inestimable value to defendant, and of no special value to the complainant. The granting of the injunction in the broad terms asked would be of great inconvenience, and even injury, to the defendant, without being of any corresponding benefit to complainant.

The decree is affirmed.

MODOC LAND AND LIVE STOCK CO. ET AL. *v.* BOOTH ET AL.

1894. SUPREME COURT OF CALIFORNIA

102 Cal. 151, 36 *Pac.* 431

BELCHER, C.: The plaintiffs brought this action to obtain a perpetual injunction, restraining the defendants—fourteen in number—from diverting any of the waters of the south fork of Pit river, or its tributaries. The case was submitted for decision in the court below upon an agreed statement of the facts, which are, in substance, as follows: The plaintiffs own, in severalty, tracts of land in Modoc county aggregating 14,382 acres. The tracts are contiguous, and extend along and on both sides of the south fork of Pit river a distance of about twelve miles, with a width of from one to three miles. About 10,000 acres of the land are of the class known as "swamp and overflowed land," and the title thereto was acquired under the state laws providing for the sale of such lands. The balance is high land, and the title to about one-half of it was acquired from the United States under the desert land act, and to the other half under the homestead and pre-emption laws. The south fork of Pit river heads in the mountains, about twenty miles east of the plaintiffs' lands, and is fed by several tributary creeks, which unite with it before it reaches their lands. The channel of the river across the plaintiffs' lands has an average width of thirty feet, a depth of five feet, and a grade of three and one-half feet to the mile; but from where it leaves their lands, for a distance of

about four miles, its grade is not more than three feet to the mile. Where the stream enters the plaintiffs' lands, it carries, in ordinary seasons, on the 1st of July, not less than 2,000 inches of water measured under a four-inch pressure; and further down on their lands another tributary creek joins it which carries in ordinary seasons, on the 1st of July, 300 inches of water, measured as aforesaid. When the plaintiffs and their grantors located their swamp and overflowed lands, the waters of the river periodically overflowed its banks during the spring and early summer, up to the middle of June of each year, and covered said swamp-land tracts from one inch to two feet in depth; and portions of the same then were, and from time immemorial had been, a tule swamp, and wholly unfit for cultivation, or the growth of valuable grasses. To reclaim the said swamp lands, and make them productive grass lands, plaintiffs and their grantors had spent large sums of money in controlling the waters of the stream upon them, and in draining them; and in order to utilize the lands, and make them produce grasses, or any crop of value, and to harvest the same, it is necessary for the plaintiffs to control the flow of said waters so as to prevent them from overflowing said lands during the haying season, which usually occupies the months of July and August of each year, and to that end to maintain extensive diverting and draining works on and around said swamp lands, to keep the water from so naturally overflowing the same. The lands described in the complaint, which were acquired from the government as "desert lands," were reclaimed from their desert character by the plaintiffs, or their grantors, by diverting upon the same, from points above said lands, portions of the waters of said river; and the amounts at different times so diverted for such purposes aggregate 1,400 inches, measured under a four-inch pressure. By the means used, plaintiffs have reclaimed most of their swamp lands, and those lands now require more irrigation than other lands in that vicinity. In the year 1889 at least one-fourth of the lands of the corporation plaintiff were too dry to produce a crop. Plaintiffs own about 7,000 head of cattle and other live stock, and they use their lands for raising hay to feed their animals during the winter season, and for pasturage during the late summer, fall, and winter months; and their animals are dependent upon the grass and herbage which grow upon said lands for food and maintenance, and upon the said stream for water to drink, while depasturing upon said lands. In June, 1886, the defendants H. G. Payne and Carlos Payne owned certain tracts of land which were not watered by any natural stream, and were not riparian to Pit river. In order to procure water for the irrigation of their land, and for their stock and domestic purposes thereon, they, in the month named, entered upon Mill creek, one of the tributaries of the said river, and about fifteen and one-half miles above the uppermost part of the plaintiffs' land, and posted a notice, in the form and manner required by law, claiming 200 inches of the

waters of the creek, to be conveyed thence by ditch to their said lands for irrigation, and other uses thereon. The notice was duly recorded, and thereafter they constructed the ditch and in 1887 diverted the waters of the creek through the same, to the extent claimed, and used them during June, July, August and September; and the use of 200 inches of water on their lands was necessary. * * * Upon these facts the court gave judgment that the plaintiffs take nothing as against the defendant H. G. Payne, and from that judgment they have appealed upon the judgment roll. The only point made for a reversal is that the court erred in not granting an injunction against the respondent, because appellants were riparian owners, and, as such, "entitled to have the stream flow in its natural channel, undiminished and unobstructed."

In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to, and cover, all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river, in Yolo county, could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county; and yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained. In Edgar *v.* Stevenson, 70 Cal. 286, it was held that a riparian proprietor, who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, can not restrain the diversion, during times of extraordinary high water, of the surplus not used or appropriated by him; and this case was referred to approvingly in Heilbron *v.* Water Co., 80 Cal. 189. In Black's Pomeroy on Water Rights (section 75) it is said: "Unless the flow of a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction against another for wrongfully diverting water from the stream." And in Lux *v.* Haggin, 69 Cal. 284, it is said: "Under our Codes, the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established

at law have no appositeness here. Here the plaintiff must, indeed, make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied." Under the law, as thus declared, were the appellants entitled to an injunction against the respondents? We do not think they were. During the months of June, July, August and September, when respondent used the small quantity of water appropriated by him, the full flow would have worked an injury, rather than a benefit, to appellants, and they sought to avoid the injury by maintaining extensive diverting and draining works, on and around their swamp lands, so as to keep them from being overflowed, and by turning the water off upon their high lands, and permitting others to turn it off upon their lands. It is true that it is stated that in the year 1889 at least one-fourth of the lands of the corporation plaintiff were too dry to produce a crop, but what particular lands were referred to, and why they were too dry, does not appear. They may have been, so far as shown by the record, chiefly its high lands, and the necessary steps to irrigate them during that year may not have been taken. Looking at the whole record, we conclude, therefore, that there was no error in the action of the court, and that the judgment appealed from should be affirmed.

We concur: Searls, C.: Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is affirmed.

I dissent: McFarland, J.

ANAHEIM UNION WATER CO. ET AL. *v.* FULLER ET AL.

1907. SUPREME COURT OF CALIFORNIA

150 *Cal.* 327, 88 *Pac.* 978, 11 *L. R. A.* (*N. S.*) 1062

SHAW, J.: This is an action to enjoin the ~~defendants from~~ diverting water from the Santa Ana river. Judgment in favor of the plaintiffs as prayed for was given in the court below. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The plaintiffs own lands through which the Santa Ana river flows. They have been accustomed for many years to irrigate this land with waters from the river, and for that purpose there is required, during the irrigating season, a continuous flow of 400 miners' inches of water. The defendants, or some of them, own land on ~~the~~ river, situated ~~above~~ the land of ~~the~~ plaintiffs, and upon it they had built a dam in the river and were thereby diverting water from the stream, which, by means of a ditch, they were con-

ducting to other lands owned by them and were there using it for irrigation. The plaintiffs claim, and the court found, that the land which the defendants were thus irrigating with water from the river was not riparian thereto. The sufficiency of the evidence to support this finding, and the question whether or not the plaintiffs' land is entitled to riparian rights in the river, are the principal questions presented upon the appeals.

* * * * * * *

3. It is further contended that the plaintiffs' land is in no wise damaged by the diversion complained of, and hence that the diversion can not be enjoined. Upon this proposition the decisions of this court, and the general principles of law regarding injunctions, are against the theory of the defendants. In Southern Cal. I. Co. *v.* Wilshire, supra, speaking of the right of a lower riparian proprietor to enjoin a diversion of a part of the stream for use outside of the watershed of the stream, leaving enough in the stream for any use which had theretofore been made, or was then proposed to be made, by the lower riparian proprietor on his land, the court said: "It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right, which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined"—citing Moore *v.* Clear L. W. Co., 68 Cal. 146; Stanford *v.* Felt, 71 Cal. 249; Heilbron *v.* Fowler S. C. Co., 75 Cal. 426, 7 Am. St. 183; Conkling *v.* Pac. I. Co., 87 Cal. 296; Walker *v.* Emerson, 89 Cal. 456; Spargur *v.* Heard, 90 Cal. 221. All of these authorities fully sustain the proposition to which they are cited. In Stanford *v.* Felt, supra, the court says: "Nor is the owner lower down the stream required to show in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right. [Citing authorities.] To prevent such result, an injunction will be awarded." The same proposition is reiterated in the other cases. The defendants, in opposition to the above decisions, cite the case of Modoc L. & L. Co. *v.* Booth, 102 Cal. 151, and Vernon I. Co. *v.* Los Angeles, 106 Cal. 243, 256. In the Modoc Case, however, it appeared that "during the months of June, July, August and September, when respondent used the small quantity of water appropriated by him, the full flow would have worked an injury rather than a benefit to appellants, and they sought to avoid the injury by maintaining expensive diverting and drainage works," to turn off the water and keep their lands from being overflowed. The decision was evidently based on the doctrine, stated in some of the decisions, that a diversion of water during times of extraordinary floods, which does not perceptibly diminish the stream below, will not be enjoined. Edgar *v.* Stevenson, 70 Cal.

286; Heilbron *v.* 76 L. & W. Co., 80 Cal. 194; Fifield *v.* S. V. W. W., 130 Cal. 552. Black's Pom. Water Rights, sec. 75. Unless it can be so reconciled, the case is contrary to all the other decisions of this court above cited and to the settled principles of law, and must be disregarded. In Vernon I. Co. *v.* Los Angeles, the plaintiff was not claiming any injury or damage by virtue of his riparian ownership, but was asserting the right to divert water for use upon lands not riparian against the city of Los Angeles, which was asserting its pueblo right, and what was said in that case, with respect to the necessity of showing injury, must be taken with the qualifications made evident by the character of the case and by the concurring opinion of Mr. Justice McFarland. The conditions existing in those cases do not exist in the case at bar. The court finds, on sufficient evidence, that the diversion of the defendants, if allowed, would render plaintiffs' land much less fertile and valuable. The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no question of the diversion of flood water involved in the case. The right which they assert is the right to take the ordinary water of the stream, and hence the doctrine of the Modoc Case does not apply.

On this point the defendants cite several cases in which it is held that a lower riparian owner can not enjoin a diversion by another riparian proprietor above, unless he can show that such diversion works damage to him, and that it is more than a just proportion of the water to which the upper owner is entitled. Such decisions are not applicable to this case. Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share and injures and damages the other thereby. Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs' property rights from the beginning, and the continuance of the trespass for a sufficient time would divest the right of the plaintiffs with respect to the water diverted. The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner upon his land, to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and, if an injunction can issue at all therein, it can be only when one owner takes more than his due proportion and damage to the other ensues from such excessive taking.

The defendants urge that inasmuch as the plaintiffs need but 400 inches of water for their land, and there remained in the stream, after defendants' diversion, more than 2,000 inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance; and hence that their diversion should not be enjoined. The theory of the law of riparian

rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream; each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above and below by those having rights in the stream. In view of the well-known aridity of the climate, and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right.

The findings support the judgment, and we are unable to perceive any substantial or material conflict in them. We find no error in the record.

The judgment and order are affirmed.

We concur: Angellotti, J.; Sloss, J.

MILLER AND LUX *v.* MADERA CANAL AND IRRIGATION CO.

1907. SUPREME COURT OF CALIFORNIA

155 *Cal.* 59, 99 *Pac.* 502, 22 *L. R. A.* (*N. S.*) 391

LORIGAN, J.: This is an appeal from an order of the superior court of Merced county granting a preliminary injunction against defendant restraining it from diverting, pending the trial of the action, into its reservoirs by means of its ditches and canals, any of the waters of Fresno river exceeding 220 cubic feet per second.

* * * * * * *

The complaint consisted of two counts. The first was to obtain an injunction to prevent the continuance of the alleged trespasses

upon the property of plaintiff described therein, and the second to recover damages for trespasses alleged to have been committed prior to the commencement of the action. The complaint is quite lengthy, and reference will be made only to the allegations therein common to both its counts and with respect to matters particularly germane to the questions raised on this appeal. It alleges that plaintiff is the owner of large tracts of land in Madera and Merced counties, those in Madera county being riparian to and irrigable from the Fresno river and its various channels and waterways, and those in Merced county riparian to and irrigable from the San Joaquin river, and adjacent to and bordering upon said river below its junction with the Fresno river; that the San Joaquin river is a natural stream arising in the Sierra Nevada Mountains, debouching therefrom into the plains of the San Joaquin Valley, and flowing thence in its natural course through its main channels and branches through the lands of the plaintiff described in the complaint; that the Fresno river is also a natural stream, having its source in the northeast portion of the county of Madera, and flowing thence in its natural course through other lands of the plaintiff described in the complaint; that the Fresno river ~~is a tributary of said San Joa~~quin river; that the waters of said Fresno river flow into the San Joaquin river at two or more points, one of which is in the said county of Madera and the other in the county of Merced; that the waters of said Fresno river naturally flow into and mingle with the waters of said San Joaquin river above nearly the whole ~~of the~~ riparian lands ~~of the plaintiff described~~ in the complaint situated in Merced ~~county~~, and flow through, over, and upon the lands of plaintiff in said county; that the waters of the Fresno river flow through, over, and upon the lands of plaintiff in Madera county and the waters of said San Joaquin river, including the waters of said Fresno river tributary thereto, except when diverted by defendant, naturally flow through, over, and upon said lands, thereby irrigating them and making them fit for cultivation and pasturage; that at large expense plaintiff has graded and leveled large portions of said land in both counties, and constructed canals and ~~other works for utilizing~~ the waters of said Fresno ~~and~~ San Joaquin rivers, and has irrigated large portions of said land, and has produced large crops of grass, feed, and cereals thereon; that the climate of that portion of the San Joaquin valley where said lands are situated is very dry and the annual rainfall very slight, and that said ~~lands unless irri~~gated otherwise than by the natural rainfall are ~~unfit for~~ cultivation and pasturage; that during the spring and summer months of every year, and occasionally in the winter months, there is a large increase of the volume of water flowing down said Fresno and San Joaquin rivers caused by rainfall and melting of the snow in the Sierra Nevada Mountains, such increased flow occurring sometimes in one of said rivers, sometimes in the other, and sometimes in both at the same time; that the annual increased flow of water

coming down said rivers at said times has from time immemorial, except when diverted by defendant, caused said rivers to overflow and to cover with said overflow a large portion of the lands previously described for a limited period of time each year; that the water causing and constituting such overflow has in each year brought down large quantities of material to said lands from the mountains and valleys through which said rivers flow in their course to said lands, deposited said material on them, and thereby fertilized and enriched said lands; that such annual overflowing of said lands has so irrigated them that a portion thereof, as the water receded therefrom, could be cultivated and crops raised thereon without further irrigation, and but for such overflowing could not have been cultivated or crops raised thereon except said lands were artificially irrigated; that during the lower stages of the waters of the Fresno river the waters thereof are confined to and flow within the lower banks of the same; that, when the waters of said rivers increase each year, such increased flow thereof naturally flows over and covers the low-lying meadow lands within and near the banks of said Fresno river; that said waters are at all times confined within the banks of said river and by such increased flow the said meadow lands are naturally watered, irrigated, and fertilized, and made more valuable thereby. It is then alleged that, within one year prior to the commencement of the action, the defendant constructed near the banks of said Fresno river on lands belonging to it situated in Madera county certain reservoirs and also certain dams and levees in connection with said reservoirs; that said reservoirs cover several hundred acres of land, and are capable of retaining and holding quantities of water to a depth of from one to twenty feet over the whole area of said reservoirs; that for the purpose of diverting the waters of the Fresno river from the natural channel thereof into said reservoirs the defendant within sixty days prior to the commencement of this action excavated and enlarged ditches and channels leading out of said river into said reservoirs, which ditches and channels were intended to convey, and have been and will be used by defendant to convey, the waters of said river from the natural channel into said reservoirs, and defendant intends to use said waters on lands not riparian to either said Fresno or San Joaquin rivers; that the waters thus diverted and intended to be diverted from said river by defendant are the natural flow of said Fresno river, and are waters which, but for such diversion, would naturally flow down said river and the channels and water-ways thereof and of said San Joaquin river through and over the lands of plaintiff; that by such wrongful diversions plaintiff will be deprived of the natural flow of the waters of said Fresno and San Joaquin rivers through and over its lands, and of the annual wetting, irrigation, and fertilization thereof by said waters, and will be deprived of the valuable and increased pasturage, feed, and crops which it has annually received from said lands as the benefit of such natural

annual overflowing, irrigation, and fertilization, and said lands will thereby deteriorate in quality and largely depreciate in value. The prayer is for a temporary injunction pending the trial of the action restraining the defendant from diverting from said Fresno river by means of said canals to said reservoirs any of the waters naturally flowing therein and that upon a final hearing the injunction be made perpetual; also for damages in the sum of $5,000 for injuries already sustained.

* * * * * * *

On the part of the plaintiff it was claimed, and its showing was made to support that claim, that the rise in the flow of the waters of said Fresno river claimed by defendant to be extraordinary and occurring on very rare occasions, was not such in point of fact; that such overflow occurred in all years of ordinary rain and snowfall, and constituted the regular annual and usual flow of said river; and that every year when there is a continuous rainfall in the watershed of the Fresno river a large volume of water flows in that water course and is carried in the channel of said river through and over lands of plaintiff in Madera county, and is emptied into the San Joaquin at a point below them, and thence flows therein over the lands of plaintiff in Merced county. The court on the hearing found that this claim of plaintiff relative to such waters was correct, and while the accuracy of this conclusion is questioned by appellant, we think that the showing made on the part of plaintiff clearly warranted it.

The matter was practically heard upon affidavits, a large number of which were filed on either side, and those upon the part of plaintiff, made by persons who had observed conditions on said Fresno river for twenty and thirty years, show that practically in every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno river carries a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that, when the volume of water flowing in the river reaches the higher stages, a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about eighteen miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a con-

tinuous body down to Lone Willow slough, and finally into the main channel of the San Joaquin river; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body as above stated within a clearly defined channel, and so continues until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence, and may be and is anticipated in every season of ordinary rainfall within the watershed of the Fresno river and fails to occur only in seasons of drouth or exceptionally light rainfall.

Upon this showing it can not be ~~said that a flow of water, occurring~~ as these waters are shown to occur, constitutes an ~~extraordinary and unusual~~ flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year, and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur. They are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails. As to such waters, it is said in Gould on Waters, sec. 211: "Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no ~~regular intervals.~~'" Heilbron *v.* Canal Co., 75 Cal. 426, 7 Am. St. 183; Cairo Railway Co. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527; Cal. T. & A. Co. *v.* Enterprise C. & L. Co. (C. C.), 127 Fed. 741. And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous ~~body~~ with the rest of the water in the stream and along well defined boundaries, they constitute a single natural watercourse. It is immaterial that the boundaries of such stream vary with the seasons, or that they do not consist of visible banks. It is ~~only necessary that there~~ be natural and accustomed limits to the channel. If within these limits or boundaries nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this constitutes one natural

water-course for all such waters, and the rights of a riparian owner thereto can not be invaded or interfered with to his injury. This is the character of the waters of the Fresno river, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted. They flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin river, and, while they spread over the bottom lands, or low places bordering on the main channel of the Fresno river as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.

It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single water-course, and that riparian rights pertain to the whole of it. As is said in Lux *v.* Haggin, 69 Cal. 418, "it is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. * * * We can conceive that in the course of a stream there may be shallow places where the water spreads and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on either side. In such case, if water flowed periodically at the portion of the depression, it flowed in a channel. * * *" In Crawford *v.* Rambo, 44 Ohio St. 279, 282, the court says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface waters. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows, it extends and flows over the bottom in its course, that is its flood channel, and, when by drouths it is reduced to its minimum, that is its low water channel." So in O'Connell *v.* Ry. Co., 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. 246: "If the flood water forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, as by the recession of the waters, it is to be regarded as still a part of the river. * * * The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds without well-defined banks or channels, so long as they form with it one body of water eventually to be discharged through the proper channel." To the same effect are Chicago, etc., Ry. Co. *v.* Emmert, 53

Nebr. 237, 68 Am. St. 602; Fordham *v.* N. P. Ry. Co., 30 Mont. 1040, 66 L. R. A. 556, 104 Am. St. 729; Jones *v.* Seaboard, etc., Ry. Co., 67 S. Car. 181; New York, etc., Ry. Co. v. Hamlet Hay Co., 149 Ind. 344; Cairo, etc., Ry. Co. *v.* Brevoort, supra. And, where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks, does not affect its character as a water-course. Macomber *v.* Godfrey, 108 Mass. 219, 11 Am. Rep. 349; West *v.* Taylor, 16 Or. 165.

But counsel for appellants rely upon the cases of Fifield *v.* Spring Valley W. Works, 130 Cal. 552, and Coleman *v.* La Franc, 137 Cal. 214, in support of their claim that a riparian proprietor can not restrain the diversion of the storm or freshet waters of a stream when such diversion will not prevent the flowing over his land of the ordinary waters of the stream, or in any way interfere with his right appurtenant thereto. We do not understand these authorities cited to sustain the proposition as broadly as appellant contends for, and an examination of them shows that they apply to conditions different from those involved in the matter at bar. In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, they constitute a part of the ordinary flow of the waters of such river. But, as to the cases cited, all they decide is that an injunction restraining the diversion of storm or flood waters will not be granted at the instance of a riparian owner when it appears that he will not be injured in any way by such diversion. In the Fifield case, which involved a flow of the water of a creek through lands of plaintiff, a riparian proprietor, his right to an injunction preventing a diversion of storm waters was denied because he was not injured thereby; the trial court finding that the diversion of the storm or flood waters of said creek would not damage his land in any way, nor in any way interfere with his right in the premises or with the right appurtenant to his land. In the Coleman case the suit was between riparian proprietors on the stream, and we do not perceive that in that case anything was decided relative to the diversion of flood waters as flood waters. The defendant in the case had built a dam in the stream for the purpose of utilizing the flood waters at times when there was abundant water for all riparian owners. It was decided that both parties as riparian owners were entitled to a reasonable quantity of the water of the stream for irrigation, and the defendant was proceeding within his rights in diverting the waters to that extent; that plaintiff could not enjoin the use of such water by defendant, unless he could show that such use was in excess of his riparian right and resulted in injury to plaintiff. The underlying principle in these cases is that there will be no injunction granted to prevent the diversion of storm or flood waters, unless such diver-

sion will result in injury to the riparian proprietor invoking it. But this principle can not be applied here because it is fully shown by the affidavits of plaintiff, as alleged in the complaint, that very often the flow of the water of said Fresno river is insufficient in quantity to irrigate the land of plaintiff riparian thereto; that the annual rainfall in that region is very slight, and that, unless irrigated otherwise than by the natural rainfall, such lands are unfit for cultivation and pasturage; that such overflow water occasioned by the floods and freshets has yearly brought down and deposited on such lands large quantities of fertilizing and enriching materials, increasing their productiveness and enhancing their value; that the water overflowing said lands is of great benefit to them, allowing of their cultivation and production of valuable crops and feed thereon without further irrigation; that, if the flow of said waters is taken away, said lands will become arid and greatly depreciated in value. This showing presents a case of great and irreparable injury to result to plaintiff if the diversion of these waters is accomplished, and presents a condition to which the principle in the Fifield and Coleman cases has no application whatever.

* * * * * * *

We perceive no reason for disturbing the order appealed from. It is purely a matter of discretion with a trial court whether a preliminary injunction applied for shall be granted or denied, and the exercise of such discretion will not be disturbed unless it clearly appears to have been abused. Nothing of the kind appears here, and the order appealed from is therefore affirmed.

We concur: McFarland, J.; Henshaw, J.

On Rehearing

* * * * * * *

Sloss, J.: This appeal was originally heard in department 2 of this court, and the order appealed from was there affirmed. Upon application of the appellant a rehearing was granted, and the cause ordered to be heard in bank.

The opinion filed by the department fully and satisfactorily disposes of all the points arising on the appeal, and is adopted as the opinion of the court in bank. A few words may, however, be added to what has heretofore been said.

The rehearing was ordered for the reason that the case was thought to involve the question of the right of a riparian owner to enjoin the diversion by an upper appropriator of water of a stream running at times of unusual and extraordinary flood in such quantities that the intended diversion could not appreciably affect or substantially injure the riparian rights of the plaintiff. This question has, to some extent, received consideration at the hands of this court in Modoc Land Co. *v.* Booth, 102 Cal. 151, and Fifield *v.* Spring Valley Water-works, 130 Cal. 552, and the appellant argues

that the rule declared in those cases requires a reversal of the order now under consideration. It appears, however, that the record before us does not present the supposed problem.

This is an appeal from an order granting a temporary injunction. It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction, the order made will not on appeal be overthrown merely because there may be considerable, or even preponderating, evidence which if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application.

While the defendant claims, and at the hearing of the motion for an injunction offered evidence with the purpose of showing, that the waters sought to be diverted by it were the results of mere occasional freshets or floods, which, if not taken, would leave the bed of the stream and be wasted, the plaintiff introduced a quantity of evidence tending to prove that the waters which defendant was about to take formed a part of the usual and ordinary flow of the Fresno river; that such flow was one which occurred in almost every season of normal rainfall, and that it passed the plaintiff's land in a continuous body of water, through a well-defined channel, and eventually emptied into the San Joaquin river and through it into the sea. That the owners of land bordering upon such a flow of water are riparian proprietors, entitled to all the rights pertaining to riparian ownership, is a proposition fully sustained by the authorities cited in the department opinion.

It is suggested that a different rule should apply in a semiarid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season, with the result that such increased flow is not at all points confined within the banks which mark the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. ~~What the riparian~~ proprietor is entitled to as against nonriparian ~~takers is the ordinary~~ and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall

of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off.

Perhaps other considerations should apply where a river, in times of heavy flow, runs over its banks in such manner that large volumes of water leave the stream and spread over adjoining lands to an indefinite extent, there to stagnate until they evaporate or are absorbed by the soil. But the evidence of respondent—and this was the evidence on which the court below acted—fails to show that the water which defendant seeks to divert was such "vagrant water." The evidence of respondent was to the effect that at all seasons the water of the Fresno river, even though overflowing the banks of the channel in which it flowed during the dry season, formed a single and continuously flowing stream.

The argument that the method of irrigation adopted by plaintiff, i. e., that of having the annual increased flow of the river spread over its lands, was not a reasonable use of the water, can have no weight in this case. The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness. If any doubt ever existed on this point, none can remain since the recent decision of this court in Anaheim Union Water Co. *v.* Fuller, 150 Cal. 327, 11 L. R. A. (N. S.) 1062. The cases relied on to show that the riparian owner is entitled to only a reasonable use of the water were all cases of controversies between owners of different parcels of land riparian to the same stream.

Virtually the same point is presented by the argument that plaintiff is not limiting itself to the most economical manner of using the water. This is not an objection which may be raised by an appropriator who seeks to divert water of the stream to nonriparian lands.

It is argued that, unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state, and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if nonriparian owners are permitted to intercept the winter flow of streams, in order to irrigate nonriparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land, is, as we have frequently said, a right of property, "a parcel of the land itself." Neither a court nor the legislature has

the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others.

On the other points raised by the appellant we have nothing to add to what was said in the department opinion.

The order is affirmed.[14]

We concur: Lorigan, J.; Angellotti, J.; Hall, J. pro tem.; Chipman, J. pro tem.

I dissent: Beatty, C. J.

JONES ET AL. *v.* CONN

1901. SUPREME COURT OF OREGON

39 *Ore.* 30, 64 *Pac.* 855

This is a suit to enjoin the defendant, Conn, from diverting the waters of Chewaucan river through a ditch recently constructed by him. The plaintiffs are riparian proprietors on the river, and the owners in severalty of divers tracts of arid land, aggregating several thousand acres. These lands are level, and, when irrigated, very fertile, but valueless without. The defendant is an upper riparian proprietor, owning 875 acres, through which the river flows a dis-

[14] See Turner *v.* James Canal Co., 155 Cal. 82, 93-95, 99 Pac. 520, 525; Fifield *v.* Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054; Mott *v.* Ewing, 90 Cal. 231, 27 Pac. 194; Gallatin *v.* Corning Irrigation Co., 163 Cal. 405, 126 Pac. 864; San Joaquin, &c. Co. *v.* Fresno Flume, &c. Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 432, 17 Pac. 535, 7 Am. St. 183; Miller and Lux *v.* Enterprise Canal and Land Co., (Cal.) 147 Pac. 567; Rait *v.* Furrow, 74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157; Broadbent *v.* Ramsbotham, 11 Exch. 602, post, p. 627.

tance of one and three-quarters to two miles, dividing on his premises into two main channels, flowing northeasterly and southeasterly, which in turn subdivide into numerous channels and sloughs, through each of which the waters of the river have been wont to flow from time immemorial. The greater portion of defendant's land is elevated from seventy-five to eighty feet above the river. Three hundred and twenty acres of it are contiguous to, but acquired by different conveyances from, land immediately bordering on the stream. In the fall of 1896 and spring of 1897 the defendant constructed the ditch in question for the purpose of irrigating his upland, and furnishing better power to a grist mill, situated on the river a short distance below its forks, which he had theretofore owned and operated with water conveyed through a ditch about half a mile long, located on his own premises. The new ditch taps the river one and one-half or two miles above his property, and has a carrying capacity of about 2,500 inches. The upland he proposes to so irrigate is somewhat lower than the bluff between it and the river, and slopes slightly away therefrom; so that it is contended that any water used thereon for irrigation can not find its way by percolation back into the river. The object of this suit is to enjoin the defendant from using water through this ditch, on the theory that it is a wasteful and unnecessary means of supplying power to his mill, and that the land he proposes to irrigate is nonriparian. The defendant avers that all his lands are riparian, and that, as a riparian proprietor, he is entitled to 2,675 inches of water for domestic, stock, irrigating and manufacturing purposes; that all of his land is arid, and capable of being irrigated from the river, which carries a large amount of water during the irrigating season; that the amount he proposes to take and consume therefrom is reasonably necessary for the purposes indicated, and will not be of any material injury to the plaintiffs, or any of them. The court below found that the defendant was entitled to take water through the ditch in question, but not use it for the irrigation of lands contiguous to, but acquired by different conveyances from, land abutting directly on the stream, when such use will actually and sensibly affect the rights of the plaintiffs as riparian proprietors, and entered a decree perpetually enjoining and restraining him from diverting any of the waters of the river to irrigate such land, "to the actual and perceptible injury of the plaintiffs as riparian proprietors upon their riparian lands." From this decree both parties appeal.

* * * * * * *

BEAN, C. J. (after stating the facts): This is a controversy between riparian proprietors upon a natural water-course. There is virtually but one question involved in the case, and that is whether the lands which the defendant seeks to irrigate are riparian in character. It is practically conceded that up to the commencement of the suit the plaintiffs had not been substantially injured or damaged on account of the use of the water by the defendant, and as a conse-

quence, are not entitled to an injunction if the lands are riparian; but the contention is that they are nonriparian, and therefore the plaintiffs are entitled to an injunction restraining the use of the water thereon without proof of damage. It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment as it passes through his land; but, as all other proprietors have a similar right, it necessarily follows that one can not use or divert the water to the injury of another. The right of each must be exercised in subordination to that of all the others. Within these limits, each proprietor is entitled to such use of the stream as may be conformable to the usages and wants of the community. It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality; and that, if an upper proprietor takes it from the stream, he must return substantially the same quantity again before it leaves his premises. This rule, however, is subject to the limitation now well established that each proprietor is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, and such use is not to be denied him on account of the loss necessarily consequent upon its proper enjoyment. * * * For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may in a proper case apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances. Harris *v.* Harrison, supra; Wiggins *v.* Water Co., 113 Cal. 182, 32 L. R. A. 667; Smith *v.* Corbit, 116 Cal. 587.

The plaintiffs admit the rule that, after the natural wants of all the riparian proprietors have been supplied, each is entitled to a reasonable use of the water for irrigating purposes, but insist that the exercise of the right must be limited to the tract of land through which the stream flows as first segregated and sold by the government of the United States, and that, even in such a case, where there are natural barriers within the tract which would prevent a portion of the land from deriving any benefit from the flow of the stream, the portion lying beyond the barrier should be excluded. But, as we understand the law, lands bordering on a stream are riparian, without regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. The discussions in the books are restricted to a definition of riparian proprietors and their respective rights. A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of the stream. They are derived entirely from the ownership of the land, and not from its area or the source of its title. Mr. Angell remarks: "The owners of water-courses are denominated by the civilians riparian proprie-

tors, and the use of the same significant and convenient term is now fully introduced into the common law." Ang. Water-courses (6th ed.), sec. 10. Gould says: "Riparian rights proper depend upon the ownership of land contiguous to the water." Gould, Waters (3d ed.), sec. 148. And Kinney says that "the rights of riparian proprietors are such as grow out of, or are connected with, their ownership of the banks of the streams and rivers." Kin. Irr., sec. 57. And, again (section 58): "Whether riparian rights attach or not, the principal question depends upon the ownership of the land which is contiguous to and touches upon the water. And as to whether the land is in actual contact with the flow of the stream, whether that contact be lateral or vertical, it is necessary that it should exist." Bouvier defines riparian proprietors as "those who own land bordering upon a water-course." Mr. Long, in his recent work on irrigation, in discussing this question, says: "Some questions have been raised as to what lands are to be considered riparian, within the sense of the preceding section. Literally, of course, riparian lands are lands bordering upon a stream, but it is sometimes a question as to how far back from the stream the land may be considered riparian. There is very little judicial authority on the question. It is plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable." Long, Irr., sec. 14. It would seem, therefore, that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him borders upon a stream. This being established, the law gives to him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water and the effect of its use upon the rights of other riparian proprietors. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which is defined as "any use that does not work actual, material and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor." Kin. Irr., sec. 276. In the determination of what will be considered such a use in a particular case, the character and extent of the land, its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its

own facts and circumstances. The case of Boehmer *v.* Irrigation Dist., 117 Cal. 79, would seem to make the extent of riparian rights depend upon the source of title, rather than the fact of title; but in Water Co. *v.* Hancock, 85 Cal. 219, it was expressly held that all land bordering upon a stream which is held by the same title—in that instance consisting of 1,280 acres—is riparian, and no distinction was made on account of the source of title. Again, in Wiggins *v.* Water Co., supra, and Bathgate *v.* Irvine, 126 Cal. 135, the right of a riparian proprietor to use the waters of a stream for irrigation was limited to the watershed. But, as we understand these cases, the court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing more was held or decided than that under the claim alone of riparian rights the owner of land can not, to the injury of another riparian proprietor, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows; and this all will concede. The right to make a reasonable use of the water of a stream is a right of property, depending on the ownership of the land abutting on or through which the stream flows; and whether a given use is reasonable or not is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors.

A reference to a few of the adjudged cases will illustrate this principle. In Norbury *v.* Kitchin, 9 Jur. (N. S.) 132, the defendant, a riparian proprietor, erected pumps and conduit pipes to conduct the water of a stream across a hill into a reservoir, to await the use of a house built by him on property he had acquired subsequently to his riparian property. It was held that the question whether his use of the stream was reasonable under all the circumstances was properly left to the jury. In one of the opinions it is said: "The defendant has built himself a house on the side of a hill, and he formed a reservoir to supply his house with water from the stream. This exercise of his right seemed somewhat strong, and the plaintiff's counsel were at one time inclined to rely upon the distance of the house from the stream, but, probably, on reflection, they found it immaterial. The real question in the case is whether a man who has 321,000 gallons of water coming down to him, can complain if 10,000 are taken before." Elliot *v.* Railroad Co., 10 Cush. 191, was an action to recover damages for the diversion of water by a railroad company, an upper proprietor, for the use of its locomotives, engines and other similar purposes. It was contended at the trial that, if the jury were satisfied of the existence of the stream and the diversion of the water by the defendant, plaintiff was entitled to a verdict for nominal damage, without proof of actual damage; but the presiding judge instructed the jury that, unless plaintiff suffered actual perceptible

damage in consequence of the diversion, the defendant was not liable in the action, and this direction was held to be right by the entire court. In the course of the opinion, Mr. Chief Justice Shaw says: "The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and, so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practical diminution of the benefit to the prejudice of a lower proprietor; whereas taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree. Still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." In Garwood *v.* Railroad Co., 83 N. Y. 400, a riparian proprietor was allowed to maintain an action to recover damages against a railroad company for diverting the waters of a stream and conveying them by pipes to reservoirs, where its locomotives were supplied with water, the proof showing that the water so diverted was sufficient "to perceptibly reduce the volume of water" in the stream, and to "materially reduce or diminish the grinding power of plaintiff's mill," in consequence of which he sustained damage to a substantial amount. In Gillis *v.* Chase, 67 N. H. 161, 31 Atl. 18, it is held that a riparian owner is not liable for a reasonable use of water passing his land, whether for his own purposes or for sale to others, and the reasonableness of his use is a question of fact. In this case it is said: "Each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact." In Fifield *v.* Water-works, 130 Cal. 552, it was held by the Supreme Court of California that a lower riparian proprietor, who

is not injured by the diversion of water by a corporation conducting and carrying on the business of supplying the inhabitants of a city with water, can not restrain such diversion. In Ulbricht *v.* Water Co., 86 Ala. 587, 4 L. R. A. 572, a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its water-works, constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of water for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that, as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it."

It is apparent, therefore, that the rule, so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream come down to his premises, is subject to the important limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material and substantial damage to the common right which each proprietor has; and, whether a proposed use is of the character referred to, and therefore reasonable, does not depend so much upon the area of the land of the offending proprietor, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. Under this doctrine the defendant was not a wrongdoer when he used the waters of the stream for the purpose of irrigation, nor does the fact that his land lies above the level thereof, so that it can not be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water, Charnock *v.* Higuerra, 111 Cal. 473, 32 L. R. A. 190, although it might have a material bearing upon the reasonableness of the use, if that question was here for decision. Gould, Waters (3d ed.), sec. 217. But there is no reason shown by this record why the defendant should be confined in the use of the water to any particular portion of his land. The amount of water taken and used by him before the trial was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. There seems to have been abundant water left in the stream after his diversion for the use of all the other riparian proprietors. There is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of nonriparian lands without showing damage, Live-stock Co. *v.* Booth, 102 Cal. 151; Gould *v.* Eaton, 117 Cal. 539,

38 L. R. A. 181; Fifield *v.* Water-works, supra; but it is clear that a court of equity will not restrain the use of water by a riparian proprietor to irrigate his lands unless it is shown that such use will injure the other riparian proprietors. Gould, Waters (3d ed.), sec. 214. The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using the waters of the stream for the purpose of irrigation, because such use was no injury to them. But, as the defendant has set up in his answer, and attempted to maintain by his testimony, the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon the other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title. Gould, Waters (3d ed.), sec. 214; Kin. Irr., sec. 329; Ulbricht *v.* Water Co., supra; Newhall *v.* Ireson, 8 Cush. 595.

It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the court could frame any other decree than one enjoining and restraining the defendant from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs, and, as the decree of the court below is to that effect, it will be affirmed.

CHAPTER II

APPROPRIATION

Section 1.—Extent and Titles of Appropriation Rights and Liberties

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BASEY ET AL. *v.* GALLAGHER ET AL.

1875. SUPREME COURT OF THE UNITED STATES

20 Wall. (U. S.) 670, 22 L. ed. 452

Mr. Justice Field delivered the opinion of the court:

This was a suit for an injunction to restrain the defendants from diverting the water of a stream known as Avalanche creek, in the Territory of Montana, to which the plaintiffs assert a right of prior appropriation for the purposes of irrigation. In their amended complaint, they allege that in the year 1866, they and their predecessors in interest took up for settlement and cultivation certain farms, designated by them as "ranches," on the public lands of the United States, near the creek in the County of Meagher in that territory; and that they or their predecessors in interest, have ever since occupied and cultivated the same; that it was necessary to irrigate the land for its successful cultivation, and to raise grain, hay and vegetables; that they, accordingly, during that year and the following spring, constructed at great labor and expense, a ditch by which they intersected the creek a short distance from its junction with the Missouri river, and conveyed its water to their farm and used it for irrigation; that at this time the water was not appropriated by any person and was subject to appropriation by them; that by their ditch they appropriated the water to the extent of five hundred inches according to the measurement of miners; that this amount was necessary to the successful cultivation of the land, and by means of it they and their predecessors in interest were enabled to cultivate their farms and raise large and valuable crops of grain, hay and vegetables.

They further allege that, subsequent to this appropriation by them and during the years 1867 and 1870 and the intervening period, the defendants erected dams across the creek above the head of their

ditch, and diverted the water of the stream, and thereby wholly deprived them of its use and enjoyment, preventing the cultivation of their farms and rendering them useless; that had the water been permitted to flow unobstructed by the dams of the defendants, there would have been a sufficient supply for irrigating and cultivating the farms. They therefore seek the aid of the court, to restrain the defendants from diverting the water, except so much as may be in excess of the five hundred inches appropriated by them.

To this complaint the defendants demurred on the grounds: 1, that the cause of action alleged was barred by the statute of limitations; and 2, that the complaint did not state a cause of action. The record does not disclose what disposition was made of the demurrer, but as an answer was subsequently filed upon which the parties proceeded to a hearing, the presumption is that it was abandoned.

The answer filed denied the several allegations of the complaint, except the one which averred the possession by the plaintiffs of their farm.

The record before us is a very defective one, and presents the case obscurely. Gathering, however, what we can from its imperfect statements, it would seem that at the May term of the district court of the territory, in 1871, previous to the final hearing, which was had at the subsequent July term, a jury was called in the case, to which certain questions were submitted and its answers taken. The jury found, substantially, that parties by the name of White and Porvais, prior to September or October, 1866, had appropriated the water of the creek to the extent of thirty-five inches; that these parties, during one of those months, gave the plaintiffs and their predecessors the right to connect with their ditch and to extend and enlarge the same; that the plaintiffs and their predecessors commenced such enlargement during those months, and increased the capacity of the ditch to two hundred and fifty inches; that White and Porvais afterwards, in 1867, sold their water right and ditch to the defendant, Stafford; that the defendant, Basey, had no interest in privity with the other defendants, and diverted the water for his own use by agreement with the plaintiffs, and that neither of the other defendants had diverted the water to the injury of the plaintiffs previous to the commencement of the action.

Upon these special findings both parties moved the court for judgment; the defendants that the complaint be dismissed; the plaintiffs that a decree pass in their favor. On these motions the court heard the whole case, "on the pleadings, evidence and proceedings therein, and the findings of the jury," and rendered a decree adjudging that the defendant, Stafford, was entitled to thirty-five inches of the water, and that as against the defendants, saving this amount, the plaintiffs were entitled to two hundred and fifteen inches of the water, and decreed an injunction against any diversion of the water by the defendants, which would prevent its flow to this extent in the stream to the ditch of the plaintiff.

In rendering this decree, the court disregarded a portion of the findings of the jury and adopted others and this action was approved by the Supreme Court of the Territory, and constitutes one of the errors assigned here for the reversal of its decree.

* * * * * * *

The question on the merits in this case is whether a right to running waters on the public lands of the United States, for purposes of irrigation, can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can, therefore, arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present, both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.

In the late case of Atchison *v.* Peterson, ante, 414, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for the purpose of irrigation. No distinction is made in those states and territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

In the case of Tartar *v.* Spring Creek Water and Mining Co., 5 Cal. 397, decided in 1855, the Supreme Court of California said:

"The current of decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, Acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes; and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. The policy of the exception is obvious. Without it the entire gold region might have been inclosed in large tracts under the pretense of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few. Aside from this the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land." Per Heydenfeldt, J., 5 Cal. 397.

Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. The Act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. Its language is: "That, whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts.

The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control.

This law was in force when the plaintiffs in this case acquired their right to the waters of Avalanche creek. There was also in force an Act of the Territory, passed on the 12th of January, 1865, to protect and regulate the irrigation of land, which declared in its first section that all persons who claimed or held a possessory right or title to any land within the territory on the bank, margin or neighborhood of any stream of water, should be "Entitled to the use of the water of said stream for the purpose of irrigation and making said claim available to the full extent of the soil for agricultural purposes." Another section provided that in case the volume of water in the stream was not sufficient to supply the continual wants of the entire country, through which it passed, an apportionment of the water should be made between different localities by commissioners appointed for that purpose. This last section has no application to the present case, for it is not pretended that there was not water enough in the district, where Avalanche creek flows, to supply the wants of the country; and the section itself was repealed in 1870. Sess. Laws of 1865, p. 367.

In January of that year another act was passed by the legislature of Montana upon the same subject, which recognizes the right by prior appropriation of water for the purposes of irrigation, and declares that all controversies respecting the rights to water under its provisions shall be determined by the date of the appropriation as respectively made by the parties, and that the water of the streams shall be made available to their full extent for irrigating purposes, without regard to deterioration in quality or diminution in quantity. "So that the same do not materially effect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator so as to render the same unavailable." Sess. Laws of 1870, p. 57.

Several decisions of the Supreme Court of Montana have been cited to us recognizing the right by prior appropriation to water for purposes of mining on the public lands of the United States, and there is no solid reason for upholding the right when the water is thus used, which does not apply with the same force when the water is sought on those lands for any other equally beneficial purpose. In Thorp *v.* Freed, 1 Mont. 652, 665, the subject was very ably discussed by two of the justices of that court, who differed in opinion upon the question in that case, where both parties had acquired the title of the government. The disagreement would seem to have arisen in the application of the doctrine to a case where title had passed from the government and not in its application to a case where neither party had acquired that title. In the course of his opinion Mr. Justice Knowles stated that ever since the settlement of the territory it had been the custom of those who had settled them-

selves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same; that this right had been generally recognized by the people of the territory, and had been universally conceded as a necessity of agricultural pursuits. "So universal," added the justice, "has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this territory, that has not been irrigated by water diverted from some running stream."

We are satisfied that the right claimed by the plaintiffs is one which, under the customs, laws and decisions of the courts of the territory, and the Act of Congress, should be recognized and protected.

We, therefore, affirm the decree of the Supreme Court of the Territory.

LOBDELL *v.* SIMPSON ET AL.

1866. SUPREME COURT OF NEVADA

2 Nev. 274, 90 Am. Dec. 537

By the court, LEWIS, C. J.:

"Every proprietor of lands on the banks of a river," says Chancellor Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua curret et debet currere ut currere solebat* is the language of the law. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of the water which would otherwise descend to the proprietor below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is an evidence of it." This is the clear and well-settled general doctrine of the common law of water-courses. The quantity of water in a natural stream could in no case be diminished to the prejudice of other proprietors, except when necessary for domestic uses, and for the watering of stock. If a reasonable use of the water for these purposes materially diminished the quantity to the prejudice of the proprietors below, no action would lie, because these were considered privileged uses. Some of the courts have held that it might also be taken for the purpose of irrigating land, though the proprietors below were prejudiced thereby; the weight of authorities, however, would seem to be against those decisions.

Whilst every riparian proprietor has a right to the reasonable use of the water for any purpose which does not diminish its quantity or deteriorate its quality to the injury of those below him on the same stream, he has no right to use or detain it upon his own land for any purpose which would result prejudicially to any other; *sic utere tuo ut alienum non loedas* is the maxim which the courts recognize as a rule which must govern riparian proprietors in the use of running water. The anomalous condition of the settlers and miners upon the public land in California has induced the courts of that state to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water. The rule adopted in California, when viewed in the light of the necessities which induced its adoption, is founded upon the clearest principles of justice. The right to land in that state, resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way. So the doctrine is well settled in California that as between persons claiming water, merely by the appropriation of the water itself, he has the best right who is first in time. "We presume that it is not to be doubted," says Judge Baldwin, in the case of Ortman *v.* Dixon, 13 Cal. 38, "that the defendants having first appropriated the water for their mill purposes, are entitled to it, to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it, for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant." So in the case of Butte Canal and Ditch Co. *v.* Vaughn, 11 Cal. 152, Mr. Justice Field, in delivering the opinion of the court, says: "The first appropriator of the water of a stream passing through the public lands in this state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation.

In this action, the plaintiff seems to have relied solely upon his prior appropriation of the waters of Desert creek. No rights by virtue of his riparian proprietorship seem to have been claimed. True, in the amended complaint it is alleged that the natural channel of the stream passed through his land, and that the waters of the creek naturally flowed into and upon his premises. It is admitted, however, in the record, that he had no title in the premises, except as a mere occupant of public land, and he does not claim that thereby he is entitled to have all the waters of the creek flow in its natural channel upon his land, but simply that he is entitled to a certain quantity of water actually appropriated by him, to wit, three hundred inches. The entire complaint shows that nothing was claimed by the plaintiff by virtue of his occupancy of the land, but only by his actual appropriation of the water itself; and the prayer is that the defendants, their agents, servants, employes and all persons having or claiming to have interests by, through or under them, be enjoined

from appropriating any of the water of Desert creek, except the surplus over and above what the ditches aforesaid will convey, to wit, three hundred inches of water with a six-inch pressure, and that the court decree to the plaintiff the right to that quantity of the water of said creek. As the main issue raised by the pleadings is priority of appropriation, the court erred in refusing to instruct the jury, as requested by the defendants, that "the plaintiff is not entitled to any greater quantity of the water of Desert creek than he actually appropriated prior to the defendants' appropriation." What we might hold if the plaintiff had relied upon his rights as a riparian proprietor, and claimed the water of the creek by virtue of his ownership of the soil, it is unnecessary to say at present. We wish it understood, however, that the views expressed in this opinion are applicable only to those cases where the parties rely solely on the prior actual appropriation of water, which seems to be the case here. We do not deem it necessary to consider the question as to whether the Indian from whom the defendants claimed title could convey any right to them or not; for if the facts are correctly pleaded in the answer, and they can be established by proof, the defendants have a right to divert the water used by them independent of any right existing in or derived from the Indian. It is alleged in the sworn answer of the defendants, that the dam and ditch complained of by the plaintiff, and by which they divert the water from the natural channel of the creek, existed not only when the plaintiff located upon the stream below, but when defendants located their land above plaintiff, and that their ditch had been in nowise enlarged or the dam raised since the location and appropriation by the respective parties plaintiff and defendants. The first appropriator of the water of a stream has undoubtedly a right under the decisions in California to the quantity of water actually appropriated by him as against any one subsequently appropriating any of the water of the same stream, and he has a right to remove any obstructions from the natural channel. But so soon as others locate upon the stream or appropriate the water, the first locator has no right to make any change in the channel, either to raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby. In other words, a person locating upon a stream and appropriating the water has a right to have it flow (so far as the natural channel is concerned) in precisely the same manner as it did when he located; and no prior locator has any right to make any such change in the natural channel as will injure subsequent appropriators of the same water. If, as in this case, there was a dam in the stream, and a ditch conveying a certain quantity of water upon public and unoccupied land above the plaintiff at the time the plaintiff located, and he had not disturbed either, and the defendants take up the land and ditch, the plaintiff would have no right after such location by the defendants to destroy the dam or close up the ditch of defendants, if by so doing the defendants would

be damaged. Neither would the defendants have any right to raise their dam or enlarge their ditch so as to deprive the plaintiff of the quantity of water appropriated by him. But they, on the other hand, have a right to claim that no dam which existed at the time of their location shall be torn down, if the tearing of it down would prejudice them.

The evidence in the case not being brought up, we are unable to determine what the rights of the defendants are; but if the facts exist as set forth in the answer, they have a right to maintain the dam as they found it at the time of their location. However, as the judgment must be reversed upon the error of the court in refusing to give the instruction above referred to, we deem it unnecessary to give the question any further consideration.

Judgment reversed and new trial ordered.

Brosnan, J., did not participate in this decision.

SMITH *v.* O'HARA ET AL.

1872. SUPREME COURT OF CALIFORNIA

43 *Cal.* 371

The plaintiff alleged in his complaint that he and his grantors, since 1851, had owned a ditch known as Woods' ditch, and had, until prevented from doing so by defendants, appropriated in it all the night and Sunday water flowing in Woods' creek, to the extent of eighty-four inches, and had also appropriated in it all the day water, to the extent of eighty-four inches, except the first twenty-five inches flowing down the same; that plaintiff became the owner of said property in 1868, and that defendants had diverted said waters and appropriated the same, and threatened to continue to do so. Judgment was asked for damages and a perpetual injunction.

The defendants were miners, who were using the water in Woods' creek for mining purposes, and claimed that they had located their mining ground before the water was appropriated in the ditch.

The court gave the jury the following instructions:

"That if at the time Woods constructed his ditch the waters of Woods' creek had to a certain extent been used by miners at work in the bed and banks of said creek in the working of their mining claims, they making no claim to the use of the waters of said creek on Sundays or in the night-time, then Woods might, during Sundays and the night-time, take for his own use, for a useful purpose, the waters of said creek, and turn them into his ditch, to be used else-

where than in the bed or banks of said creek; and if you believe, from the evidence, that such use and appropriation of the waters of Woods' creek was acquiesced in by the said miners, Woods and the miners mutually using the waters of said creek in the manner and at the times indicated, then Woods, by such appropriation, followed by a continued use of the same, would acquire such a right to the use of the waters of said creek during Sundays and night-time as would forbid the said miners, without his consent, from taking for their use the waters of said creek during Sundays and night-time, when by such taking they should deprive Woods of the use of the waters by him so originally taken and continuously used for a useful purpose during Sundays and night-time."

The defendants excepted to this charge.

The court then submitted the following special issues to the jury, which, after they had retired, they answered as follows:

"1. To how many inches of water is plaintiff entitled of the waters of Woods' creek during the night-time and Sundays, as against defendants in this action?

"Answer—Eighty-four (84) inches.

"2. To how many inches of water of Woods' creek were the miners in Woods' creek entitled in the day-time, prior to any appropriation of the waters of Woods' creek by the plaintiff?

"Answer—Twenty-five (25) inches.

"3. After allowing for the amount of water of Woods' creek to which you may find the miners of Woods' creek entitled as against plaintiff, to how many inches of water is plaintiff entitled as against the defendants?

"Answer—Eighty-four (84) inches.

"4. Did the defendants, between the 1st day of October, 1868, and the 25th day of June, 1869, deprive the plaintiff of the use of any water to which he was entitled as against the defendants?

"Answer—Yes.

"5. If defendants have deprived the plaintiff of the use of any water to which he was entitled, what damage has plaintiff sustained by reason of such acts of defendants?

"Answer—One hundred and four (104) dollars."

The court rendered judgment for the plaintiff, and enjoined the defendants from appropriating the night and Sunday water to the extent of eighty-four inches, and any of the day water to the extent of eighty-four inches, after they had first taken out twenty-five inches. The defendants appealed.

The other facts are stated in the opinion.

* * * * * * *

By the court, RHODES, J.:

It is not to be doubted, that the person who first appropriates for mining or other purposes the waters of a stream running upon the public lands, is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or other pur-

poses. The defendants do not question this doctrine, but deny its application to this case.

The court instructed the jury, in effect, that if the miners who were using the waters of the creek, made no claim to the use of the waters during Sunday and in the night-time, another person might appropriate the water, during such time, to his own use; and if he did so appropriate and continuously use the waters, the miners could not thereafter deprive him of the use of the waters during those times to the extent to which he had appropriated them. The jury found that the plaintiff was entitled to eighty-four inches of the water of Woods' creek during the night-time and Sundays, as against the defendants. It results from the proposition first stated, that if the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him his right thereto is as perfect, and entitled to the same protection, as that of the first appropriator to the portion appropriated by him. In Ortman *v.* Dixon, 13 Cal. 34, it was decreed that the defendants were entitled to the waters of the creek for the use of their mill; that the plaintiffs were then entitled to sufficient water to fill their ditch, No. 2; and that the defendants were next entitled to the residue to fill their ditch, No. 3. The cases are very numerous which affirm, or assume without question, this doctrine. It is usually the case that the amount of water to which the several persons claiming its use are entitled, is measured by inches, according to miner's measurement, or by the capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days or parts of days, and to other persons for other specified times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume.

The plaintiff adduced no written evidence of the transfer to himself of the right to the ditch through which were conveyed the waters claimed by him, from those who had constructed it, or been in possession of it, but he proved by oral testimony that it was sold to him by Woods, the person, or one of the persons, who had constructed and used it. This evidence was properly stricken out by the court. But the court, in instructing the jury in respect to the appropriation and use of the waters of the creek, charged them in respect to the relative rights of Woods and the miners who used

the waters of the creek. This was calculated to mislead the jury, by giving them the impression that the plaintiff had succeeded to the rights of Woods. The instruction, in that respect, was erroneous, and the defendants, in order to correct that erroneous impression, were entitled to have the instruction given which was asked by them, to the effect that the plaintiff could not connect himself with the rights acquired by Woods and Sedgwick except by deed. We can not say that this error did not injure the defendants, for it can not be ascertained from the record whether the jury found for the plaintiff upon his own appropriation and use of the waters, or upon that of Woods and Sedgwick.

Judgment and order reversed, and cause remanded for a new trial.

HANDY DITCH CO. *v.* LOUDEN IRRIGATING CANAL CO.

1900. SUPREME COURT OF COLORADO

27 Colo. 515, 62 *Pac.* 847

CAMPBELL, C. J.: The Big Thompson, the Louden, and the Handy irrigating ditches, situate in water district No. 4, take water from the Big Thompson river, a natural stream, in Larimer county. In 1883, in the statutory proceedings provided for that purpose, there was rendered in the district court of Boulder county a decree, by which their respective priorities of right to the use of the water for irrigation were adjudicated and determined to be in the order just mentioned. This decree gave to the Big Thompson ditch a priority of seventy-eight cubic feet of water per second of time. In 1897 the Handy Ditch Company, appellant, the owner of the Handy ditch, purchased the Big Thompson ditch and its decreed priority, and changed the point of diversion from the headgate of the Big Thompson ditch, through which up to that time the water had been carried, and thereafter diverted the water through the headgate of the Handy ditch, and applied the water thus diverted to the irrigation of lands belonging to its stockholders lying under the Handy ditch. The headgate of the Big Thompson ditch is several miles below those of the other two ditches. The appellee, the Louden Irrigating Canal Company, the owner of the Louden ditch, thereupon brought this action to restrain the appellant company (defendant below) and the water commissioner from diverting any part of the priority of the Big Thompson ditch, through the medium of the Handy ditch, until after the priority belonging to the Louden ditch was satisfied. One of the objections made by the appellee to this diversion was that there had been an abandonment by the owners of the Big Thompson ditch of the greater

quantity of water decreed to it. Upon conflicting evidence the court found that all of such decreed priority, except twenty cubic feet of water, had been abandoned, and since the year 1883 such excess had been in the undisturbed use and possession of appellee and other water consumers from the river; and upon this finding a decree was entered, permitting appellant to divert, through the Handy ditch, twenty cubic feet of water per second of time, and no more, of the Big Thompson priority. Both parties excepted to, and have appealed from, the decree, and duly assigned errors.

While the appellant complains of the action of the court in restricting it to twenty cubic feet of water, and maintains that it is entitled so to divert the entire seventy-eight cubic feet, the appellee, on the contrary, insists that up to the time of the purchase by the Handy Ditch Company the former owners of the Big Thompson ditch never used for irrigating their lands to exceed six or seven cubic feet of water. Much evidence was taken upon this and other controverted points. We have examined it sufficiently to ascertain that, though there is a substantial conflict in the evidence, yet the finding that there had been an abandonment of the priority in excess of twenty cubic feet rests upon sufficient legal evidence, and that the finding that twenty cubic feet of such priority has not been abandoned is likewise sustained. We, therefore, find it unnecessary to pass upon a number of assignments of error made by both parties, and based upon the rejection and admission of testimony, because if, as contended, there were erroneous rulings by the trial court, they were not prejudicial to either party.

A more important question grows out of that assignment of error by the appellee that the trial court erred in permitting the Handy Ditch Company to divert from the Big Thompson river into the Handy ditch any part of the Big Thompson priority. In its replication to the answer the appellee, plaintiff below, among other things alleged that below the headgates of the Louden and Handy ditches the water of the Big Thompson river was augmented by springs, seepage, return water, and tributaries to the amount of about fifty cubic feet per second of time during the irrigating season, and that this increased flow was available for, and amply sufficient to supply, the entire appropriation to which the Big Thompson ditch was entitled; but when the Handy Ditch Company, after the purchase of the Big Thompson ditch and its priority, attempted to change the place of diversion from the original headgate of the Big Thompson to that of the Handy ditch, several miles further up the stream, such supply was not available at the new point of diversion. It thus appears that the point sought to be made was that, so long as the original place of diversion was maintained, the volume of water in the river was sufficient to supply the entire appropriation of both ditches; but if the owner of the Big Thompson priority was permitted to change the place of diversion, as was attempted, the Louden ditch would not be able to get any water to supply its needs.

This squarely presents the question: In what circumstances may an appropriator of water from a natural stream change the place of diversion? The general rule is that an appropriator of water for any beneficial purpose may change the place of diversion at his pleasure, provided the rights of others are not injuriously affected. This right, however, is not absolute, but is subject to the qualification just mentioned. This qualification, moreover, was not by the courts annexed to the right to change for the protection or benefit of prior appropriators. Indeed, it is peculiarly applicable to subsequent appropriators, and they are in a position to complain if their rights are infringed. The rights of a prior appropriator, as against a subsequent appropriator who changes the place of diversion, are already sufficiently safeguarded by the fundamental doctrine of so-called "irrigation law." He who is first in time is first in right. A subsequent appropriator has a vested right, as against his senior, to insist upon the continuance of the conditions that existed at the time he made his appropriation, and if a change of place of diversion by a senior interferes with, or changes those conditions to the prejudice of, a subsequent appropriator, the latter may justly complain. Fuller *v.* Mining Co., 12 Colo. 12; Strickler *v.* City of Colorado Springs, 16 Colo. 61; Cache La Poudre Irr. Co. *v.* Larimer & Weld Reservoir Co., 25 Colo. 144; Kin. Irr., secs. 175, 231, 248; Black, Pom. Water Rights, sec. 69; Junkans *v.* Bergin, 67 Cal. 267; Hague *v.* Irrigation Co., 16 Utah 421, 41 L. R. A. 311; Last Chance Min. Co. *v.* Bunker Hill & S. Min. & Concentrating Co. (C. C.), 49 Fed. 430; Mining Co. *v.* Holter, 1 Mont. 296. In principle sustaining this case, see Water Supply & Storage Co. *v.* Larimer & Weld Reservoir Co., 25 Colo. 87.

When the appellee attempted to support its claim that the change of place of diversion was injurious to it, the court refused the offer, and in making the ruling remarked that since the same conditions which the evidence offered tended to prove may have existed when the original decree determining the respective priorities was rendered, and presumably were then considered, it was not proper, in this proceeding, to enter upon that inquiry. In this we think the court was clearly in error, and misapprehended the law governing the right claimed. In the nature of things, the decree that established the priorities could not, in advance of some future change of the place of diversion by one appropriator,—and, indeed, it did not purport to,—ordain that such change would or would not injuriously affect some other appropriator on the same stream. That question could not be determined until the change was attempted, and must depend upon the facts of each particular case. We can not conceive how the original decree could have anticipated or settled, and in fact it does not purport so to do, any such question as is involved in the proposition we are now considering.

The appellant attempts to sustain this ruling of the court by arguing that it is only a prior, and not a subsequent, appropriator who

can complain of another appropriator who seeks to change the place of diversion; but, as we have already seen, this is not the law. It is true a prior appropriator may complain of any act of a subsequent appropriator which interferes with the former's supply of water, whether that act consists of a change of the place of use, the character of the use, or in taking an excessive amount of water at the original intake. While a prior appropriator may change the place of diversion, he may not do so if he injuriously affects the rights of, or thereby imposes an additional burden upon, a subsequent appropriator. Whether the attempted change disturbed the conditions in the continued existence of which the owners of the Louden ditch had a vested right it is not possible to determine from this record, because the trial court refused to permit appellee to introduce evidence in support of that claim. Possibly appellee's replication is not quite specific upon this point, but no objection seems to have been made below upon that ground, and the offer of proof made by appellee was sufficiently broad to be responsive to a perfect plea of that nature; and the objection to the proof is not based upon any indefiniteness of statement, but upon the broad ground that appellee, being a junior appropriator, is not in a position to complain of any change in the place of diversion which appellant, a senior appropriator, chooses to make.

Appellant's assignments of error are not good, nor are those of appellee, except the one based upon the erroneous ruling of the court in rejecting its offer to prove injury. In no event is appellant entitled, as against appellee, to divert, at any place, from the Big Thompson river, more than twenty cubic feet of water per second of time, under the priority of the Big Thompson ditch, until after the priority of the Louden ditch is supplied. Whether it may divert said twenty cubic feet, or any part thereof, through the Handy ditch, depends upon whether or not by such change the appellee is injuriously affected. If it is, whether, and to what extent, such change injures appellee, is the sole issue to be determined by the district court, if another trial be had. The judgment is reversed, and the cause remanded, with directions, if there be another trial, that it be only of the issue just referred to, made by the fifth subdivision of the replication. Reversed and remanded.[15]

[15] "As part of the decree, though such relief was not specifically prayed, the court ordered that this particular water right, which originally belonged to the appropriation of the Fluke ditch, be disconnected therefrom, and diverted and enjoyed through the Clear Fork ditch. In other words, the court authorized a change in the point of diversion of this particular water from the Fluke ditch to the headgate of the Clear Fork ditch. This decree was made after the passage by our General Assembly of an act authorizing and prescribing a particular procedure in court for the change in the point of diversion of water taken from a natural stream. Sess. Laws 1899, p. 235, ch. 105. This act was construed in New Cache La Poudre I. Co. *v.* Water S. & S. Co., 29 Colo. 469, 68 Pac. 781, where it was held applicable to changes that were not perfected at the time it took effect, and it was also said that there was no constitutional objection to the act as applied to a vested right

WHITE BROS. AND CRUM CO., LIMITED *v.* WATSON ET AL.

1911. SUPREME COURT OF WASHINGTON

64 *Wash.* 666, 117 *Pac.* 497

ELLIS, J.: Appeal from a judgment sustaining a general demurrer to appellant's amended complaint, which is long, but which, so far as essential to our consideration, may be epitomized as follows: Yakiwawai creek, a stream not navigable, has its source in Whitman county, Wash., about two miles above the land of respondents described in the complaint, and thence flows to and across that land and the lands of the appellant also described in the complaint. The respondents acquired their land by filing thereon as a government homestead on April 16, 1902. In 1881 the appellant's predecessors in interest ap-

to such change which accrued before its passage. The facts are here that while, by an arrangement between the parties to the transaction, consent was given to change the point of diversion from one ditch to another, and while, as between the parties to that agreement, the same may be binding, yet, as we held in the case just referred to, the parties, by such arrangement, can not bind other appropriators, or the state and its officers, who, under the statutes, are charged with the duty of distributing water in accordance with decrees of the court on that subject. This portion of the decree, therefore, can not be sustained. While the change of the point of diversion from the Fluke, to the Clear Fork, ditch had been made and was recognized and consented to by the immediate parties, and probably by all the owners of the two ditches, consent thereto by the water commissioner and by other appropriators from the same stream in the same water district was withheld, and no decree permitting the change was rendered, as required by the act adverted to. The water commissioner testifies that when no objction was made he permitted the change to be made, but did not, as indeed he could not, recognize its validity. When objection was made, he refused to permit the water to flow through the Clear Fork ditch, but turned it into the Fluke ditch, in accordance with the decree.

"The district court, in this action, whose primary object was to obtain a decree quieting title to a water right, had not the power to adjudge that a change in the point of diversion thereof might be made. That can be done only in proceedings under the act so providing, in the appropriate court, where all persons affected by such change are duly notified, and not until it appears that their rights are not injuriously affected.

"Some other questions are discussed by counsel; but, in view of the conclusion which we have reached, they are not important, and their determination would not change the same. The decree of the lower court is modified to the extent that it allowed a change in the point of diversion from the Fluke, to the Clear Fork, ditch of the twenty inches of water in dispute, and authorized the water commissioner to proceed in accordance therewith." Fluke *v.* Ford, 35 Colo. 112, 115-117, 84 Pac. 469, 470.

See Colo. Rev. Stat. 1908, §§ 3226-3232; New Cache La Poudre Irrigation Co. *v.* Water Supply and Storage Co., 29 Colo. 469, 68 Pac. 781; New Cache La Poudre Irrigating Co. *v.* Arthur Irrigation Co., 37 Colo. 530, 87 Pac. 799; Bates *v.* Hall, 44 Colo. 360, 98 Pac. 3; Lower Latham Ditch Co. *v.* Bijou Irrigation Co., 41 Colo. 212, 93 Pac. 483; Hallett *v.* Carpenter, 37 Colo. 30, 86 Pac. 317; Utah Comp. Laws, § 1288xx24.

propriated all the waters of the creek, and carried the same by a ditch and flume from the point of diversion to the lands now owned by the appellant, and ever since the water has been applied to a beneficial use by the appellant upon its land, which without irrigation is arid and unproductive, but with irrigation is highly productive. At the time of the appropriation of the water, respondents' land and all the lands riparian to the creek above the appellant's lands were public lands of the United States. All of the land above the appellant's land drained by the creek is steep and precipitous, is used only for pasturage, and the rainfall and melting snows are not retained thereon, but readily flow into and cause frequent floods of the creek. The stream, until it reaches the appellant's land, flows through a narrow canyon with steep bluffs on either side, and has a fall of approximately 2,000 feet from its source to appellant's land. In the spring of 1907 the flood waters of the creek destroyed appellant's flume and head ditch, and washed away the banks at the point of diversion, making it impossible to divert the water by means of the ditch and flume previously used. The bed of the stream was eroded, causing the water to flow over a sandy and gravelly bottom, so that since the flood much of the water is lost at the original point of diversion. The right of way by which the water has been carried is along a steep bluff, and respondents' lands traversed by it are unfit for cultivation. The right of way is gravelly, and, if appellant is required to convey the water by a ditch, a great part of it will be lost by percolation and evaporation, causing a material injury to the appellant and being of no benefit to respondents. About seventy-six feet above the point of diversion the stream flows over a natural bed rock, and it is necessary in order to secure and retain full use of the water to change the point of diversion to that point, there construct a cement dam, and thence lay a pipe line along the right of way across respondents' land to that of appellant. Unless this is permitted, the appellant will in the future be wholly deprived of the use of the water. Prior to commencing this action, appellant went upon the respondents' land to construct the proposed dam and pipe line, when respondents, by force and threats of violence, prevented and still prevent the work. The prayer is for an injunction against interference, for damages, that title to the water, right of way, pipe line, and headworks be quieted in appellant, and for general relief.

It will be noted that there is no direct allegation that the point of diversion, either as originally located or as now proposed, is upon the respondents' land. This is urged as one reason that the demurrer was properly sustained. The inference, however, from a reading of the whole amended complaint is that both of these points and the site of the proposed dam are upon respondents' land. In the absence of a motion to make the amended complaint more specific in these particulars, the demurrer should not have been sustained on this ground.

Assuming these points to be alleged as implied, does the amended complaint state a cause of action? The demurrer concedes that the appellant's predecessors in interest had appropriated the water at the original point of diversion, and were conducting it by ditch and flume over the original right of way prior to the inception of respondents' title and while the fee of respondents' land was still in the United States. Section 2339 of the revised statutes of the United States (U. S. Comp. Stat. 1901, p. 1437) provides for the recognition by the courts of vested and accrued water rights, and section 2340, (page 1437) is as follows: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." Respondents, therefore, took their land subject to the easement for the diversion of the water at a then fixed point, and for the conveyance of the water by ditch and flume on a then existing right of way across their land to that of the appellants. The grant from the government to the respondents was that of a servient tenement, subject to a definite easement. There can be no difference between the easement so acquired and an easement created by grant of a private owner who afterwards conveys the servient tenement. In either case the owner of the dominant tenement has an easement which he can not change without the consent of the grantee of the servient tenement. The grant from the government to the respondents was subject to "vested and accrued water rights or rights to ditches and reservoirs used in connnection with such water rights as may have been acquired," etc. There is no intention evinced by the statute to make the grant subject to such water rights or rights to ditches and reservoirs as may thereafter become necessary or convenient. That a change in the mode of enjoyment might have been made while the government still owned the servient tenement does not alter the case. That was because the owner of the servient tenement—the government—had accorded a license through the statute to appropriate any such rights at any time prior to the grant of patent or allowance of homestead or pre-emption. But, when the government granted the fee, it granted it subject not to the license, but to vested and accrued rights which had then been acquired under the license. Smith *v.* Hawkins, 110 Cal. 122, 125; Oliver *v.* Agasse, 132 Cal. 297. By the grant the title to everything not then appropriated became vested in the respondents as completely as the appropriated rights had become vested in the appellant. Thereafter the jus disponendi incident to the fee was in respondents as to every right not vested in others by actual prior appropriation. The manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way—in short, the easement—became fixed and determined by the facts as they existed when respondents' homestead entry was allowed. No change can now be made in the

character of the servitude. A pipe line can not be substituted for a ditch and flume, nor the right of way changed or lengthened. As to these things the authorities are uniform. Weil's Water Rights in the Western States (2d ed.), pp. 285, 286, secs. 179-180; title "B," Change of Means of Use; Oliver *v.* Agasse, 132 Cal. 297; Vestal *v.* Young, 147 Cal. 715; Johnston *v.* Hyde, 32 N. J. Eq. 446; Allen *v.* San Jose Land and Water Co., 92 Cal. 138, 15 L. R. A. 93; Dickenson *v.* Grand Junction Canal Co., 15 Beav. 260; Barrows *v.* Fox, 98 Cal. 63; Gregory *v.* Nelson, 41 Cal. 278. "It is the exclusive right of the owner of the servient tenement, suffering the burdens of an easement localized and defined, to say whether or not the dominant owner shall be permitted to change the character or plan of the servitude." Jaqui *v.* Johnson, 27 N. J. Eq. 526, 532.

It is suggested that the right which the appellant is seeking to obtain is rather an implied or secondary easement than an additional servitude. The term "secondary easement" is applied to the right to enter and repair and do those things necessary to the full enjoyment of an easement as existing. We have been cited to no authority for extending that term to a change, alteration, or extension such as here contemplated, while the above authorities hold that the things contemplated are in their nature an additional servitude.

Counsel argues with much force and persuasiveness that, inasmuch as the respondents will in no wise be injured by a change from ditch and flume to pipe line, the right to make the change should be accorded to the appellant; that the taking of the additional right of way and conducting the water in a pipe line invades no substantial right of the respondents. But, even if it were shown that the change would be an actual benefit to the respondents, we would have no power to compel them to accept the benefit. The question is one of property rights, not of benefits or injuries. Many authorities so hold, and we have been cited to none to the contrary. "No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury." Merritt *v.* Parker, 1 N. J. Law, 460; Allen *v.* San Jose Land and Water Co., 92 Cal. 138, 15 L. R. A. 93; Dickenson *v.* Grand Junction Canal Co., 15 Beav. 260; Tillotson *v.* Smith, 32 N. H. 90, 64 Am. Dec. 355. The alteration by the action of the elements of the physical conditions so as to make the enjoyment of the easement impossible or more difficult was appellant's misfortune as an impairment of its property, just as if the elements had impaired the enjoyment of its property of any other character. This furnishes no reason why another should be required to contribute to restore the enjoyment of the property, even if the thing to be contributed be something the other does not need, and the surrender of which will not injure him. If it is something in which he has the actual right of property, there is no rule of law nor principle of equity which would warrant a court in taking it from him

against his will for the benefit of another. No amount of hardship in a given case would justify the establishment of such a precedent. The next step in the invasion of the right of property would be to invite the courts to measure the comparative needs of private parties, and compel a transfer to the one most needing and who might best utilize the property. If a man may be required to surrender what is his own because he does not need it and can not use it, and because another does need it and can use it, then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration. The judiciary may only apply the law according to established principles. If rights such as those here contended for are to be accorded and can be accorded within the limits of our Constitution, it should be done by statute clearly defining the rights, fixing their limits, and prescribing the procedure.

The demurrer was properly sustained. Affirmed.

Dunbar, C. J., and Crow, Fullerton, and Morris, JJ., concur.

PARKS CANAL AND MINING COMPANY LIMITED *v.* HOYT

1880. SUPREME COURT OF CALIFORNIA

57 Cal. 44

Ever since 1854, the plaintiff and its predecessors were the owners of a ditch diverting water from Squaw Hollow creek, of sufficient capacity to divert all the water of said creek, except during heavy storms in the winter. The predecessors of the plaintiff had constructed a ditch, diverting water from Cossumnes river, and bringing it into the natural channel of Squaw Hollow creek, at a point about a mile above the head of Squaw Hollow creek ditch; and had enlarged the latter ditch for the purpose of carrying the increased supply of water.

Afterwards, the defendant diverted, and used for irrigating purposes, a quantity of water from Squaw Hollow creek, at a point between the mouth of the ditch leading from Cossumnes river and the head of Squaw Hollow creek ditch. At the times of taking said water, there was not sufficient water in Squaw Hollow creek to fill Squaw Hollow creek ditch; and the plaintiff notified the defendant that he would be required to pay the market rates for the water appropriated; and the defendant, at the time of receiving said notice, claimed the right to use the water, and declared his intention of not paying the plaintiff.

The action was brought to recover the value of this water, as of personal property sold and delivered.

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McKINSTRY, J.: For the purposes of this decision, it may be admitted that water acquired by appropriation (to be sold to miners and others), by means of a ditch leading from a natural stream, becomes, after it has passed into the ditch, the personal property of the appropriator. Further, it may be admitted, that if water be taken or diverted from the ditch, without the consent of the appropriator, he may waive the tort and bring an action for the value of the water taken. Nevertheless, although such appropriator may be entitled to the flow of the stream undiminished, the water in the stream above his ditch is not his personal property. The stream as yet flows in its natural course—a part of the realty. The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs, created by art, or applied to the purpose of leading or storing water by artificial means. It follows, that he can not maintain an action for the value of the water—as for personal property sold and delivered—against one who, without his consent, has diverted the stream above the mouth of his ditch.

The evidence tended to prove that plaintiff was owner of a ditch dug for the purpose of conducting water from the Cossumnes river to Squaw Hollow creek, and also of another ditch leading from Squaw Hollow creek, at a point below the Cossumnes ditch. Defendant diverted water from Squaw Hollow creek at a place between the two ditches. There was evidence, that, "at the times the water was taken by the defendant, there was not sufficient water in Squaw Hollow creek to fill the Squaw Hollow creek ditch." But there was no evidence of the quantity of water then running from the Cossumnes ditch into Squaw Hollow creek, or that any was flowing through that ditch. For aught that appears, all the water diverted by defendant was water naturally flowing in Squaw Hollow creek. If this was the case, it is clear, from what has been said above, that an action for the value of the water, as personal property, can not be maintained. The natural bed of Squaw Hollow creek acquired the character of an artificial conduit to the extent, and only to the extent, that the waters of the Cossumnes river flowed through it. The water brought to Squaw Hollow creek by the Cossumnes river ditch alone, if any water can be so considered, can be considered the personal property of the plaintiff.

The defendant moved for a nonsuit, on the ground, amongst others, that "the testimony utterly fails to show any contract, agreement, or promise by defendant to pay plaintiff for the alleged water." If plaintiff relies upon the promise to pay reasonable value, which the law implies from the wrongful taking of personal property—the tort being waived—there is a complete failure to prove the facts from which the promise is implied (and therefore the promise it-

self), since the evidence fails to show that any personal property was taken.

The view we have adopted renders it unnecessary to decide other questions presented. We may suggest, however, first, the answer does not distinctly deny that the plaintiff was organized as an association under the laws of Pennsylvania; and second, the complaint fails to allege that the laws of Pennsylvania gave to plaintiff the power to sue, or any other corporate power.

Judgment and order affirmed.[16]

Morrison, C. J., and Ross, J. concurred.

THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY *v.* BOLES ET AL. No. 2

1864. SUPREME COURT OF CALIFORNIA

24 Cal. 359

By the court, SAWYER, J.:

The complaint alleges that the plaintiff is the owner of a ditch cut for the purpose of conveying the waters of Rock creek to certain mining localities, for sale; that defendants, before the commencement of the suit, constructed two reservoirs in the bed of Rock creek, above the head of plaintiff's said ditch, by means of which the waters of Rock creek are collected and detained from one day to a week at a time, and then let down in large quantities by opening the gates of said reservoirs; that, by these means, the waters of said streams are not allowed to flow regularly, or with a uniform current, to said ditch; that if said waters flow down said ditch with an uniform and uninterrupted current, said plaintiff has now, and has had for more than six months last past, a market for the same, by which it now can and could heretofore have realized about one hundred dollars per week for the same, by sale to quartz and placer miners; and that he would have said market for a great length of time hereafter; that by the interruption of the regular flow of the waters, as before stated, the plaintiff's customers are unable to use the same; that the market and sale of the said waters depend entirely on the uniform and natural flow of said waters; that if the interruption continues, the plaintiff will lose from fifty to one hundred dollars per week; that defendants are insolvent, and will be unable to respond in damages; that said reservoirs are a nuisance; and that

[16] See Crippen *v.* White, 28 Colo. 298, 64 Pac. 184; Heyneman *v.* Blake, 19 Cal. 579, 594; Stanislaus Water Co. *v.* Bachman, 152 Cal. 716, 725, 93 Pac. 858, 862 et seq.; Copeland *v.* Fairview Land and Water Co., 165 Cal. 148, 131 Pac. 119; Ferens *v.* O'Brien, 11 Q. B. D. 21.

the damages already accrued amount to five hundred dollars. Plaintiff prays judgment for the damages alleged, that the nuisance be abated, and the defendants be enjoined from obstructing in future the regular and uniform flow of said water.

The defendants, in their answer—after denying most of the material allegations of the complaint, and claiming a right to the waters in themselves—allege, among other things, that for a long term of years said ditch has ceased to convey any water, and has been mined away at its head, and at various other places, and since 1856 has been disused, and has neither carried nor been in a condition to carry any water; that said plaintiff, in and since 1856, sold water to various miners from another ditch owned by plaintiff, and that said miners, with the waters so purchased of plaintiff, with the knowledge, approbation, and consent of the plaintiff, washed away and destroyed the ditch described in the complaint to such an extent that it was wholly destroyed and unfit for conveying any water, and that since 1856 to the present time, the said ditch, by reason of said washing away and destruction, has been and still is wholly unfit to carry any water. They deny that said waters have flowed in said ditch since 1856, or that said reservoirs have in any manner affected the flow of said waters into said ditch. They aver that if plaintiff had a ditch to convey the waters collected in said reservoirs, they would be as useful to plaintiff as they otherwise would be; that for the want of any ditch sufficient or fit to carry the said waters, the same flow down Rock creek, after being used by defendants, past the head of the ditch described in the complaint; that plaintiffs are not in a condition to use said waters until they rebuild the ditch which has been washed away as before stated.

The verdict of the jury and the judgment thereon were for the defendants, and plaintiff appealed.

On the trial, defendants introduced testimony, under objection and exception on the part of the plaintiff, tending to prove the destruction and condition of the ditch as alleged in the answer, and the court instructed the jury as follows: "In determining the proposition whether defendants' reservoirs are a nuisance, you will look at all the evidence as to plaintiff's ditch and dam being out of order, and unable to carry the water, and take all the testimony that has been given into consideration." To the giving of which plaintiff excepted, and these rulings are relied on as error.

We think there was no error in admitting the testimony, or giving the instruction based upon it. The question was, whether the reservoirs were a nuisance in the then present condition of things—not whether they might become a nuisance at some future time, when the plaintiff might see fit to put its ditch in a condition to enjoy its right to the water. The plaintiff only had a right, by virtue of prior appropriation, to the use of the water in its natural flow. Other parties above were equally entitled to its use, so long as it was used in such a manner as not to injure the plaintiff. If plaintiff's ditch and

dam had, for seven years, or any less period of time, as defendants claim, been in such a condition that it was impossible to turn the water into the ditch, or for the ditch to carry it, the plaintiff could not be injured, or the reservoirs become a nuisance, until the ditch should be repaired and placed in a condition to be available for the purpose designed. An action could not be maintained to abate the reservoirs, as a nuisance, till they actually became such. There is no claim that plaintiff was entitled to or desired the water for any other purpose than to convey in their ditch for sale.

But the plaintiff says there was also evidence tending to show that in 1860, a year or more before the reservoirs were built, the defendants themselves washed away plaintiff's ditch and dam, and that plaintiff at that time endeavored to repair it, and was prevented from doing so by the defendants, and for this reason the instruction was erroneous and liable to mislead the jury. There are two answers to this: Firstly—the plaintiff is sueing to abate a present nuisance, erected long since the transactions referred to, and not to recover damages for destroying plaintiff's dam and ditch in 1860, and a recovery must be had, if at all, upon the case stated in the complaint. Secondly—it is a question for the jury to determine what facts are established by the evidence, and they might have found against the plaintiff on that point. They were, therefore, entitled to "look at the evidence" referred to, as directed by the court, in connection with the other evidence in the case. For the same reasons, the instruction asked by plaintiff (which was precisely the reverse of the one given and just considered) was properly refused.

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No error having been brought to our notice, the judgment is affirmed.

HUFFNER ET AL. *v.* SAWDAY ET AL.

1908. SUPREME COURT OF CALIFORNIA

153 *Cal.* 86, 94 *Pac.* 424

SLOSS, J.: This is an action to enjoin the defendants from diverting water from a stream knows as the "San Pasqual river." The plaintiffs recovered judgment, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint sets forth two counts or causes of action. Each of the counts alleges that the San Pasqual river is a stream arising in the Volcan mountains, in San Diego county, whence it flows in a westerly course through the San Pasqual valley to the Pacific Ocean; that the plaintiffs are, respectively, owners of seventeen several parcels of land in the San Pasqual valley, each of which is irrigable

and in cultivation, and that said plaintiffs and their predecessors have for more than thirty years cultivated their land by means of water taken from said stream, which furnishes the only means of irrigating these lands. It is alleged that the defendants assert the right to, and unless restrained, will divert at a point about twenty-five miles above plaintiffs' lands, the waters of the stream to the extent of three thousand inches, and that, if the defendants are permitted to make this diversion, each of the plaintiffs will be deprived of water for irrigation.

The foregoing averments are, as has been said, common to both counts. The first contains the further allegation that the San Pasqual river in its natural course flows over, through, and along each of the tracts described as belonging to the various plaintiffs, and that the defendants' asserted right of diversion is based upon a notice of appropriation, according to which the water is to be used upon land situated outside of the watershed tributary to San Pasqual river. The second count alleges, in addition to what has been stated, that two thousand five hundred inches of water is required to properly irrigate the lands belonging to the plaintiffs, and that, in order to obtain such supply, the plaintiffs and their predecessors did, prior to 1878, appropriate from the waters of the stream two thousand five hundred inches, and they have ever since diverted all the water flowing in said stream up to two thousand five hundred inches, and conducted the same upon their several tracts for use therein. It is further alleged in the second count that the water in the stream at plaintiffs' point of diversion rarely exceeds two thousand inches, and during most of the irrigating season is less than one thousand inches.

It will be seen that the plaintiffs rely upon two different grounds of objection to the proposed diversion by defendants. In the first count they stand upon their right as riparian proprietors; in the second count they assert a claim as prior appropriators. It may be said at this point that no error was committed in overruling the demurrer to the complaint. * * *

The court found that the San Pasqual river is a water-course as alleged in the complaint; that the plaintiffs are the owners of the respective tracts claimed by them; that ten of the seventeen holdings described in the complaint border upon the stream. It is found that the plaintiffs' lands have been irrigated from the stream for twenty-five years, and would be of little value without irrigation. The findings declare that for the past eight years the entire flow of the stream has been inadequate to irrigate the lands of the plaintiffs, and that if the defendants are permitted to divert the waters from the stream each of the plaintiffs will be deprived of water for irrigating his tract of land, and will suffer irreparable loss and damage. The court found that the defendants had posted and recorded their notice

of appropriation, and had performed the work as alleged in their answer, but had not prosecuted the same diligently. The place to which the defendants claim the right to take the water is found to be on a different watershed from that tributary to the San Pasqual river. There is a finding against the plea of acquiescence and consent on the part of the plaintiffs. The judgment decrees that the defendants have no right or title to the waters of the San Pasqual river, and no right to divert the same, and perpetually enjoins them from taking or diverting from the river any of the waters of the stream or in any manner whatsoever interrupting, obstructing, or interfering with the free, usual, or customary flow of water down or through said stream.

* * * * * * *

Finding fifteen, to the effect that a large part of each of the tracts described in the complaint has for twenty-five years been continuously cultivated by means of water taken from the stream, is, it is contended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would if undisturbed flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a "part and parcel" of the land itself, Duckworth *v.* Watsonville W. & L. Co., 150 Cal. 520, and plaintiffs are entitled to have restrained any act which would infringe upon this right. In Southern Cal. I. Co. *v.* Wilshire, 144 Cal. 68, the court said: "It is not necessary in such cases for the plaintiff to show damage, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined." In Stanford *v.* Felt, 71 Cal. 249, it is said: "Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right. To prevent such result, an injunction will be awarded." These, and other authorities to the same effect, are reviewed in Anaheim Union Water *v.* Fuller, 150 Cal. 327, 11 L. R. A. (N. S.) 1062, in which the doctrine is reasserted.

In so far, however, as the rights of the plaintiffs rest upon prior appropriation and use, it was no doubt necessary for them to show that the proposed diversion would diminish the flow of water which they had been receiving for use upon their lands. That a part of the

lands of each of the plaintiffs had been, for many years, irrigated by means of water taken from the stream, whenever the supply of water permitted, was fully shown by the evidence. The last seven years preceding the trial of the action had been exceptionally "dry," and during them the flow of water had ceased earlier in the spring than in former years. The fact that during this period the plaintiffs had not been able to get as much water as theretofore did not destroy the continuity of their use, nor deprive them of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount. It is urged that there is no evidence to support the finding that the proposed diversion by defendants would cause irreparable damage or loss to plaintiffs. But the plaintiffs offered evidence to show that, during the seven or eight years preceding the trial, the flow of water in the stream had been so light that there was no surface flow at the lower end of the valley. One of defendants' witnesses testified that nobody in the San Pasqual valley "gets plenty of water for irrigation." It is apparent that if, as matters now stand, the plaintiffs are unable to get from the stream all the water they need (and claim to be entitled to), they will be damaged, if defendants are permitted to divert, at a higher point, three thousand inches of the water of the stream. It is true that there is evidence to the effect that during the summer months, when the stream is dry in the San Pasqual valley, there is some water running at the defendants' point of diversion. It does not follow, however, that the taking of this water would not injure the respondents. There are long stretches of sandy bottom between the defendants' proposed works and the lands of the plaintiffs. Water flowing over the rocky bed above sinks into the sand, which must become saturated before there can be a flow over its surface. To so fill this sand requires, as a witness testifies, several weeks. The court was justified in drawing from this testimony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state. Los Angeles *v.* Pomeroy, 124 Cal. 621; McClintock *v.* Hudson, 141 Cal. 275; Cohen *v.* La Canada Co., 142 Cal. 437; Verdugo Canyon Water Co. *v.* Verdugo (filed Jan. 23, 1908), 152 Cal. 655.

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The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiffs' lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make such return of the

water. Gould *v.* Eaton, 117 Cal. 539, 38 L. R. A. 181; Montecito Valley Co. *v.* Santa Barbara, 144 Cal. 578. But here there was testimony from one of the defendants themselves that the water, if diverted, would return to the San Pasqual valley through the Santa Maria creek, and evidence was introduced to show that this creek joins the San Pasqual below the lands of the plaintiffs. If, as the trial court had the right to believe, this was the true state of facts, there was no way in which the defendants could divert the water claimed by them without injury to the plaintiffs.

The findings already discussed lead to the conclusion that the plaintiffs, whether, as riparian proprietors or as prior appropriators of all the waters ordinarily flowing in the stream, had a right superior to that of the defendants, even if the latter did everything required under the statute to constitute a valid appropriation. There is no occasion, therefore, to consider whether the evidence justified the finding that the defendants had failed to prosecute their work diligently. If the finding on this point had been in their favor, it would not have enlarged the rights of the appellants.

The judgment and order are affirmed.[17]

We concur: Shaw, J.; Angelotti, J.; Lorigan, J.; Henshaw, J.

WATER SUPPLY AND STORAGE CO *v.* LARIMER AND WELD RESERVOIR CO. ET AL.

1898. SUPREME COURT OF COLORADO

25 *Colo.* 87, 53 *Pac.* 386

Action by the Water Supply and Storage Company against the Larimer & Weld Reservoir Company and Rollin Q. Tenney, water commissioner, etc. Judgment in favor of the plaintiff, and defendants appealed to the Court of Appeals, 7 Colo. App. 225, where the judgment was reversed, and plaintiff brings error.

* * * * * * *

GABBERT, J.: The Court of Appeals, in passing upon the questions presented by the record in this case, held that a reservoir company taking water for storage from a tributary is not liable to be enjoined from so doing at the suit of an appropriator of water from the main stream above the mouth of the tributary, for the reason that the diversion by the former could not injure the latter, and also held that the right of appropriators below the point where such tributary joins the main stream can not be determined except in a proceeding to which they are parties, and stated in the opinion that it did not

[17] See Clark *v.* Ashley, 34 Colo. 285, 82 Pac. 588.

appear from the record there were any appropriations senior to those of the Storage Company below the mouth of Dry creek, and for these reasons reversed the judgment of the district court. Larimer & Weld Reservoir Co. *v.* Water Supply and Storage Co., 7 Colo. App. 225. These were the only questions passed upon by the Court of Appeals, and it becomes necessary to first determine whether or not its judgment was correct.

In brief, it appears from the pleadings, stipulation regarding the facts, and the findings of the trial court, which are supported by the evidence, that the ditch of the Storage Company takes its water from the Cache la Poudre river; that the Reservoir Company diverts its water from Dry creek; that this stream joins the main stream below the intake of the Storage Company's ditch; that the appropriation of the Storage Company is senior to that of the Reservoir Company; that there are appropriations below the point where Dry creek joins the river, senior to both the Reservoir and Storage Companies; that in times of scarcity of water there is not sufficient flowing to the head gate of the Storage Company's ditch to supply it and the senior priorities below the mouth of Dry creek; that the water commissioner permits the Reservoir Company to divert the waters of Dry creek into its reservoir; and that the latter company claims the right so to do, without regard to the rights of the Storage Company. The question here presented is identical with that passed upon in the case of Platte Valley Irr. Co. *v.* Buckers Irrigation, Milling and Improvement Co., 25 Colo. 77, namely, an appropriator from a stream may require a junior appropriator from a tributary thereof which joins such stream below the intake of the former's ditch to surrender the use of water from the tributary in favor of appropriations from the main stream, senior to both, below the point where the tributary joins it, to the extent that the volume flowing to the head gate of such appropriator is insufficient to supply such senior appropriations and his own; or, in other words, bearing in mind the conditions here present, an appropriator from a stream may require a junior appropriator from a tributary which joins such stream below the point of the intake of the former's ditch to surrender his use of water in favor of appropriations from the main stream, senior to each, below the point where the tributary joins such stream, before he does. In this case the facts established clearly bring it within the doctrine above announced. The Storage Company diverts its water from the main stream; the Reservoir Company, from Dry creek. There are appropriations senior to both below the point where Dry creek joins the stream. The appropriation of the Storage Company is senior to that of the Reservoir Company. In times of scarcity of water in the main stream, there is insufficient flowing to the head gate of the Storage Company to supply it and the senior appropriations below; and therefore, when these conditions exist, the Storage Company has the right to demand that the Reservoir Company shall first surrender the water which it claims the right to divert from Dry creek, in favor

of senior appropriations below the mouth thereof, on the main stream; thereby, to this extent, augmenting the flow which shall reach such senior appropriations, and correspondingly decreasing the volume which must pass by the head gate of the Storage Company for the use of such appropriations. It was held by the Court of Appeals that the right of appropriators below the point where Dry creek joined the main stream could not be determined, except in a proceeding to which they were parties, but that was not a question presented for determination in this action. The parties conceded there were appropriators prior to both below the point where Dry creek joined the river; and the question for the court to determine was, not the rights of such appropriators as against either of the parties to this action, but what were the rights between the litigants with reference to the question as to which should first surrender water in order to supply such senior priorities. Our conclusion is that the Court of Appeals erred in its application of the law to the facts as presented by the record; and, not having passed upon the other assignments of error of the Reservoir Company, it becomes necessary to dispose of them in this court.

The complaint of the Storage Company was inartificially drawn,—certainly ambiguous,—and, alone, may have failed to state a cause of action, because it did not appear therefrom that the diversion of the Reservoir Company from Dry creek was in any manner injuriously affecting its rights. A defective complaint, however, may be aided, and omissions supplied, by the answer, Railroad Co. *v.* Cahill, 8 Colo. App. 158, or an allegation in the replication, if acquiesced in, Id. The Reservoir Company by its answer made it clear that Dry creek joined the river below the intake of the Larimer County ditch, and the Storage Company, by its replication, though in an informal manner, averred it was being required to surrender water for the use of senior appropriators below the mouth of Dry creek in volume equal to that diverted from this source by the Reservoir Company, to which statement in the replication the latter interposed no objection. Neither of these statements appeared in the complaint when the demurrer was interposed, and, conceding that their omission was fatal, the judgment of the court, in overruling the demurrer, was error without prejudice; for, with these omissions subsequently supplied, a cause of action was stated in favor of the Storage Company.

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The judgment which the Reservoir Company pleaded as a second defense in this action was res adjudicata between the parties to this suit on the one question as to which had the superior right to utilize the waters of Dry creek by direct diversion; but this is not the question which the parties are here litigating, nor could it, under the issues made by the pleadings in that case, have been litigated or adjudicated therein, and therefore this plea was no defense to the action instituted by the Storage Company; for a former judgment on the merits is only conclusive between the parties when the ques-

tion to be determined in the second action is the same question judicially settled in the first, Huntley *v.* Holt, 59 Conn. 102, but such judgment does not operate as an estoppel with respect to matters not determined therein which could not have been properly litigated under the issues in the action in which the judgment was rendered (see note to above case, 21 Am. St. 71).

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The judgment of the district court should be affirmed, and the judgment of the Court of Appeals is therefore reversed, and the cause remanded, with directions to affirm the judgment of the trial court.

Reversed and remanded.[18]

PROCTOR *v.* JENNINGS

1870. SUPREME COURT OF NEVADA

6 *Nev.* 83, 3 *Am. Rep.* 240

By the court, LEWIS, C. J.:

1. "In the year 1865, the plaintiff constructed a water mill upon Six-mile canyon, the motive power of the same being the water of the stream of said canyon, conducted therefrom by a ditch leading from a point above the mill to the said water-wheel. After passing over said wheel, the water fell into the channel of said stream and passed on down the same, there being sufficient fall from the bottom of the wheel to the channel, and from there down sufficient grade to the channel, to enable the water leaving the wheel to pass off freely and without obstructing the working of the same. As to the defendant, the plaintiff was the prior appropriator of the water privilege to the extent above mentioned, and he has since done nothing by which he has lost any of the rights so acquired, or diminished their extent.

2. "Subsequently to the acquisition of plaintiff's rights, and in October, 1867, the defendant constructed a dam across the channel of said stream, at a point about one hundred and fifty-five feet below the wheel of plaintiff, and below and east of the east line of plaintiff's land, together with a waste-way, flume and ditch, for the purpose of furnishing power for certain works of defendant below. At the time of constructing said dam, the defendant was fully apprised of the prior rights of plaintiff, and was expressly notified by him not to obstruct the same in any manner to interfere with those rights.

[18] See Platte Valley Irrigation Co. *v.* Buckers Irrigation &c. Co., 25 Colo. 77, 53 Pac. 334; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Hillman *v.* Newington, 57 Cal. 56; West Point Irrigation Co. *v.* Moroni & Mt. Pleasant Irrigation Ditch Co., 21 Utah 229, 61 Pac. 16; Anaheim Union Water Co. *v.* Fuller, 150 Cal. 327, 88 Pac. 978.

3. "The effect of the construction of defendant's dam was to cause the sediment coming down said stream to gather above the dam to the level of the bottom of the ditch leading from the same, and to cause the water of the stream to set back towards plaintiff's wheel, upon the same level, and thus diminish very materially the grade of the channel below said wheel. But at the time of its construction it did not so back the water or sediment, or diminish the grade as to prevent the free flow of the water from plaintiff's wheel, and did not at all interfere with the working of the same.

4. "The dam so constructed by defendant has not since been altered in height, and there has been no alteration of the level or altitude of the flume and ditch leading from the same. During the latter part of the year 1867, the whole of the year 1868, and up to the — day of June, 1869, the works of defendant below did not in any manner obstruct or interfere with the free flow of the water from plaintiff's wheel, which was in use during all said period, or in any manner obstruct or interfere with the working of said wheel; and had the waters of said stream continued to flow down to the said works of plaintiff and defendant in their natural state and condition in which they did run and flow down to the same at the time of defendant's appropriation, and during the period aforesaid up to the — day of June, 1869, the said works of defendant would not materially have interfered with the workings of plaintiff's wheel, or the free flow of the water therefrom.

5. "About the — day of June, 1869, certain parties, who were in the possession of mining claims along the channel of said stream above the works of both plaintiff and defendant, adopted a new mode of working their claims and of using the waters of the stream in the working thereof. They had theretofore so used the waters as to permit the same to flow down naturally and regularly, and the change consisted in penning the water up for longer or shorter periods in reservoirs constructed for that purpose, and then permitting the same to escape suddenly and in large quantities, and pass down the stream with a flood. The effect of this was to carry down by the power of the floods of water so discharged, large amounts of tailings and sediment collected in said reservoirs and lying in the channel of said stream to the works of defendant, and thereby fill up his dam above the ordinary level of discharge, and to cause the same to accumulate in masses above said works as far back as the wheel of plaintiff, and to cause the back water and sediment to obstruct the free flow of water from the wheel of plaintiff, and prevent the regular and efficient working thereof.

6. "Had it not been for the acts above mentioned, the works of defendant would not have materially interfered with the working of plaintiff's wheel; and on the other hand, had it not been for the works of the defendant, the acts of said miners would have done no injury to the plaintiff; and the grade of the channel below said wheel, if left in the condition in which it was prior to the construction of

defendant's dam and ditch, would have been sufficient to discharge freely all the water and sediment coming down said stream, notwithstanding the irregular flow thereof."

Upon these facts, found by the court below, a decree was rendered enjoining the defendant from continuing his dam at such a height as in any manner to interfere with or retard the revolutions or workings of the plaintiff's water-wheel attached to the mill and buildings mentioned in the complaint. The defendant appeals.

But one question is presented by the record, or need be considered by the court, namely: Can a dam erected on a stream in a manner in no wise injurious or prejudicial at the time of its erection to a mill-owner above, but which, by reason of circumstances happening subsequently, and which could not have been anticipated at the time, operating in connection with it, and so causing the water to flow back upon the mill above, be held such obstruction as to authorize its abatement, or justify a recovery of damages against the person so building the dam for injury thus occasioned? We think not. Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried, that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has any one the right to do anything which will, in the natural or probable course of things, curtail or interfere with the prior acquired rights of those either above or below him on the same stream.

The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it, as the rights of those before him are secure from interference by him. Upon what principle, then, can it be held that he is responsible for injuries resulting to the prior appropriators, occasioned not immediately by his acts of appropriation, but by unforeseen and fortuitous circumstances happening after his appropriation, and acting in connection with the means employed by him to appropriate the surplus water?

Here the defendant had the undoubted right to make use of all the water flowing from the plaintiff's mill, and to build a dam or employ any other means of appropriation not prejudicial to the rights of the plaintiff. But at the time Jennings built his dam, it did not in any way interfere with the right of Proctor, nor is it claimed that in the ordinary course of things it would have done so, or that it could have been anticipated that the immediate cause of the injury would

have occurred. Under such circumstances, the law, we think, does not hold the defendant liable, nor adjudge his dam such an obstruction or nuisance as may be abated.

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Again, the same rule is thus laid down in Bell *v.* McClintock, 9 Watts 119: "When the plaintiff erected his dam he was bound to notice, not only its effects at the time, but its effects at all seasons as well. In this stream as well as all other large streams which fall into the Alleghany river, there are regular freshets or floods which swell the volume of water, and thereby enable the inhabitants to raft down the river the various products of the country. They are expected with considerable certainty at fixed times and seasons. It was the duty of the plaintiff with reference to this, which is at least of yearly occurrence, to calculate the immediate probable effects the dam would have at all seasons of the year on the property of his neighbors above as well as below his erection. A neglect to use the necessary precaution, or a miscalculation of its effects, where it works an injury to another, may be compensated in damages. But where the injury arises from some cause out of the ordinary course, from some unusual cause, as for instance, from a flood or freshet such as has been described by the witnesses, the owner of the dam is not liable to damages. It is *damnum absque injuria.* They are not such accidents as ordinary foresight or prudence can guard against, and for this reason a distinction has been taken as to the liability of the party." See, also, Ang. on Wat., sec. 347 et seq.

By the rule adopted in these cases, which seems not only a correct, but just one, it was incumbent on the defendant to so erect his dam that it would do no injury to the plaintiff, either under the then existing circumstances, or such as might be anticipated to happen in the future; but he was not required to go further, nor where he has used such precaution is he liable for injuries resulting from causes which could not be foreseen in conjunction with his dam. Such is the result of the rule when applied to this case.

That he could not have foreseen or anticipated the new mode of working the mines above himself and plaintiff is a self-evident proposition, if, as found by the court below, it were in fact a new process.

The decree must be vacated. It is so ordered.

HILL *v.* SMITH

1865. SUPREME COURT OF CALIFORNIA

27 Cal. 476

This action was commenced May 26, 1863. The complaint averred the excavation of a ditch for the conveyance of water for mining purposes from Indian Canyon to Iowa hill, by plaintiff's grantor, in 1852, and the continuous use of the water of the canyon in the ditch from that time up to the commencement of the suit; and that at the time the ditch was dug the water flowed down in a clear state, without any mixture of mud or sediment, and so remained until the acts of defendant complained of; and that the water, when in a clear condition, was more valuable and profitable to plaintiff for sale for mining purposes than when mixed with mud and sediment. That the defendant had been engaged for four weeks in digging up the bed of the canyon at points from six hundred to one thousand feet above the head of the ditch, and washing down the earth with the water into the ditch, thereby mixing the earth, mud and sediment with the water, so that the same settled in the bottom of the ditch and reservoirs, and lessened their capacity and increased the expense of cleaning the same. That the miners who purchased the water from plaintiff, used the same through hose, and that when it was loaded with mud it destroyed their hose, etc., and that plaintiff's sales of water had been injured thereby.

The complaint prayed for judgment for damages, and for an injunction.

The answer did not deny in express language the allegations of the complaint, but in answer thereto stated that the waters of Indian Canyon had not flowed down in a clear state, and that defendant had not washed any earth into plaintiff's ditch, etc.

The defendant, on the trial, proved that he had located a claim above the head of the ditch a short time before the suit was commenced, and was engaged in working the same, but introduced no evidence to show that he had found any gold there. The evidence showed that the bed of the canyon above the head of the ditch was about one hundred feet in width, and that the earth was from three to four feet in depth, and that the defendant used the water of the canyon to work his claim, and that after the water left the claim it flowed into the ditch.

The court gave the following instructions to the jury, to which plaintiff excepted:

"It is very difficult to state with exactness the rights of a ditch-owner as against miners who subsequently locate claims on the same stream above the head of the ditch. Our courts have endeavored to adopt those rules in relation to the subject which will allow, as far

as possible, both these classes of location upon the public domain to enjoy their property. Of course, if the first locator of a water ditch upon a clear stream was held to be entitled to the continuous use of the water in a pure state, then large regions of rich mining country would be kept from settlement and development. On the other hand, if miners were allowed to locate claims immediately above the heads of ditches, and to mine there to the same extent and with the same rights as elsewhere, then large ditches, costing thousands of dollars, would be unjustly at the mercy of every adventurer.

"The rule in such cases, so far as any can be definitely stated, is this: The subsequent locators of mining claims on a stream above a ditch, which diverts water for sale to miners, have no right to work their claims, or run their tailings in such a manner as either to entirely obstruct the flow of water into the ditch, or to obstruct it to any considerable extent, or to diminish the quantity of water belonging to the ditch, or to so deteriorate the quality of the water as to render it unfit for mining purposes, or to so fill up the ditch with sediment as to materially lessen its value; but the mere fact that their mining operations muddy the water, rendering it less valuable, though not unfit for mining purposes, or deposit sediment in the ditch to only such an extent as may be easily removed, without great cost, does not render them liable in an action like the one at bar.

"If, therefore, in this case you believe from the evidence that defendant is the bona fide owner of mining claims on the stream above the head of plaintiff's ditch, that he worked his claims in a reasonable manner, using all due precaution to prevent injury to the ditch; that the effect of his mining was only to muddy the water, but not to diminish its quantity, or to materially injure the ditch or the water, then defendant is not liable. But if you believe defendant's mining operations seriously obstructed the flow of water into plaintiff's ditch, or diminished the quantity of water flowing into it, or in any manner materially injured the ditch or the water, then you should find for plaintiff, giving her nominal damages, of course, and such actual damages not exceeding three hundred dollars, as you believe from the evidence she sustained."

The defendant recovered judgment, and the plaintiff appealed from an order denying a new trial and from the judgment.

The other facts are stated in the opinion of the court.

* * * * * * *

By the Court, Sanderson, C. J.:

* * * * * * *

After a careful examination of the evidence, we are impressed with the conviction that the plaintiff ought to have recovered. And we can only account for the verdict upon the hypothesis that the jury misapprehended the law of the case. The plaintiff's prior right is unquestioned. That the defendant's work caused large quantities of rubbish and sediment to be deposited in plaintiff's reservoir and ditches, thereby lessening their capacity and entailing upon her

additional expense in cleaning them out and maintaining their original capacity, hardly admits of debate. And it is very clear from the evidence that the value of the water for mining purposes, by reason of the mud and sediment mixed with it by the defendant's mining operations, was diminished by from one-fourth to one-half. It appears that the plaintiff's ditch supplied water to hydraulic claims which require water, as was clearly shown, in a purer state than claims worked by the sluicing process or method, in order to work them successfully. Where she had previously sold only sixty inches of water she was compelled to sell a hundred and a hundred and twenty at the same price in consequence of the deterioration of its solvent capacity by reason of the sediment and mud from defendant's claim. It further appears that on one or two occasions the miners, or some of them, who purchased water from the plaintiff, quit work entirely, because the water was so thick with sediment that it could not be used with any reasonable success in hydraulic mining. To say that such injuries are immaterial and therefore constitute no cause of action is to trifle with the prior rights of the plaintiff and misrepresent the law. There seems to have been a successful effort made on the part of the defense to prove that the defendant had studiously conducted his mining operations in such a manner as to cause the least possible injury to the water rights of the plaintiff. It is probable that the jury supposed that, having thus worked, the defendant was not responsible for injuries unavoidably resulting from his work, upon the vague notion that everybody has a right to mine at such points as he may choose, provided he causes as little injury to others as is possible under all the circumstances. Such is the only theory upon which we can account for the verdict. Some stress was placed upon this testimony by the judge, and while we think it was not intentional, the general and abstract terms in which the instructions of the court were couched were, to a certain extent, as it appears to us, calculated to convey to the jury the idea that such was the law of the case. How cautiously or carefully the defendant worked was a matter of no consequence, for if his work in fact injured the plaintiff, he was none the less liable to an action. Moreover, the entire charge impliedly if not expressly proceeds upon and sanctions the idea that as between ditch-owners and miners using the water of a stream in the mineral regions of the state for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other. This is due in a great measure doubtless to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this sub-

ject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non laedas,* upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch-owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all controversies like the present the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to wit: has the plaintiff's use and enjoyment of the water for the purposes for which he claims its use been impaired by the acts of the defendant? This is purely a question of fact for the jury, and all the law applicable to it is found, as stated by the learned counsel for appellants, in the case of the Phœnix W. Co. *v.* Fletcher, 23 Cal. 483, embraced in the three following maxims: *Qui prior est in tempore, potior est in jure; Ubi jus, ibi remedium; Sic utere tuo ut alienum non laedas;* and beyond these principles they do not require to be instructed. What diminution in quantity or what deterioration in quality will injuriously affect the use of the water by the plaintiff may be safely left to the determination of the jury, guided only by the foregoing maxims. It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined in view of the use to which the water is applied, and the other circumstances developed by the testimony.

Judgment reversed and new trial ordered.

CONRAD ET AL. *v.* ARROWHEAD HOT SPRINGS HOTEL CO. ET AL.

1894. SUPREME COURT OF CALIFORNIA

103 *Cal.* 399, 37 *Pac.* 386

SEARLS, C.: This action was brought to abate a private nuisance, and for a perpetual injunction against its continuance. Plaintiffs had judgment granting them a perpetual injunction, and for nominal damages. Defendants moved for a new trial, which was refused. Two separate appeals are taken,—one from the final judgment, and the other from the order denying a new trial.

* * * * * * *

Plaintiffs are the owners of certain tracts of nonriparian lands in the county of San Bernardino, forming a part of a larger tract known as the "Orange Grove Tract." Defendant, the Arrowhead Hot Springs Hotel Company (a corporation), is, and it and its grantors have been since 1882, the owners in fee of a tract of land situate upon both sides of and including the bed and banks of East Twin creek, an unnavigable stream, which lands the court finds "are, and from time immemorial have been, riparian to said creek and its flow." There are upon the lands of said defendant a large number of springs,—hot, cold, and medicinal,—and also what are designated "mud baths." Defendant has upon said land, and for ten years prior to the commencement of this action had, an hotel thereon, as a resort for invalids, with bath houses, mud baths, etc., all of which are used for the entertainment of guests and treatment of invalids generally, whether suffering from rheumatic troubles, diseases of the blood, or other diseases. During all of said ten years, defendant has discharged from its kitchen, bath houses, hotel, privies, etc., the drainage and accumulation of filth and refuse matter therein accumulating, by means of sewers, pipes, etc., into certain ravines contiguous thereto, from and through which ravines it flows by natural channels into and down East Twin creek and pollutes the waters thereof so that they are unfit for drinking, or for any domestic purpose. Plaintiffs have a ditch which diverts the water from East Twin creek about one-half mile below where defendant discharges its sewerage into the stream, by which, and a pipe line connected therewith, they conduct the water of said creek to their land for domestic purposes, and for irrigating their land. Plaintiffs aver, and the court finds, that they have been using, and had a right for one year before the commencement of this action to use, the water of the creek for irrigation and domestic purposes upon their land. There is no allegation or finding as to the date of construction of the ditch through which plaintiffs take the water from the creek, or the source or origin or character of their right thereto. The evi-

dence shows that in 1887 John Hancock conveyed the land now owned by plaintiffs to certain grantees, and in his deed of conveyance included "all the right, title, and interest of John Hancock, the party of the first part therein, in and to the waters of East Twin creek and its tributaries, acquired either by appropriation or otherwise, and then owned or held by him as riparian proprietor of the lands aforesaid, or otherwise; also, ditches held by him, or to which he was entitled, and a right of way for said ditches and such pipe line as the grantees desired to construct over a tract of land held by the grantor on East Twin creek as a timber culture claim," reserving to the grantor five inches of water to be taken from the ditch, which it recites was constructed in 1885, and is, say, one mile in length. Plaintiffs have constructed a pipe line from the end of the ditch to their several lots of land for a distance of, say, one-half mile. The ditch through which the water furnished to plaintiffs' land is diverted and conducted thereto taps East Twin creek, so far as can be determined from the record, about one mile above the Orange Grove tract of land. Defendants, in their answer, plead a prescriptive right to the use of East Twin creek as a place of deposit for the refuse from their hotel, baths, etc. There was evidence to show that until a period within four years next before July 19, 1892, the land of plaintiffs was wholly unoccupied and vacant, not settled upon or improved, and that the pipe system had not, at the last-mentioned date, been in use more than two years. The court found against the prescriptive right of the defendants.

Judging from the record, and the conclusion is drawn that the rights of the plaintiffs are those of the ordinary locators who divert water for a useful purpose from a stream in this state. In other words, they are appropriators. The defendants, as riparian proprietors upon the same stream, have a right thereto prior in time, and, as to the acts complained of, are prior in user, to any rights of plaintiffs. As against other riparian owners below them on the same stream, defendants have no right to pollute the water to the material injury of the former. Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such stream, or caused a deterioration of its quality, the subsequent locator can not complain. Familiar examples of the application of this rule, as between appropriators, are of frequent occurrence in the mining regions of this state, where water is diverted from flowing streams, upon which mining has destroyed the purity of the water. In such cases the appropriator takes the water with his eyes open,—takes it as he finds it,—and as to him the like continued deterioration is *damnum absque injuria*. Drainage and the discharge of the sewerage from the hotel of the defendants is shown by the evidence to have been necessary, in the interest of sanitary conditions, and to have been for ten years accomplished by the only feasible plan, of discharging into the ravines

contiguous to and upon their own premises. This was not, nor was its continuance as against subsequent locators and appropriators of the water of the stream, a wrongful act. "Every person who constructs a drain or cesspool upon his own premises, and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors." Wood, Nuis. (3d ed.), sec. 114. This doctrine is well settled, and applies as between parties who have equal rights to the enjoyment of their own property, and to be protected from injury arising from the undue use by their neighbors of their property. In the case of appropriators of running water, there is no mutuality of right. Their titles or rights are not coextensive as to time, or equal in rank. The second appropriator simply takes the residuum in quantity, subject to the changed conditions existing by reason of the prior user. If the water of East Twin creek was so contaminated by the acts of defendants as to be detrimental to the public, or to individuals living upon the stream below, a very different question would be presented. But as an individual who should collect the refuse from a slaughter yard, and haul it to his home, would not be heard to complain that the odor constituted a nuisance, so the locators of this ditch, who have diverted the water of the stream to their homes, a mile or more away, can not be heard to complain that the water continues after their diversion, as it was before, noxious to the senses, and unfit for domestic use.

Two results follow from the position assumed:

1. The finding of the court that "the defendant corporation has not any right, and at the time this action was commenced had not acquired any right, to drain or sewer its said premises by conducting its sewerage matter accumulating on said premises, from any source or cause, into East Twin creek," is contrary to the evidence.

2. The conclusions of law and judgment are unsupported by the findings.

The judgment and the order denying a new trial, and each of them, should be reversed, and a new trial had.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order denying a new trial, and each of them, are reversed, and a new trial ordered.

WHITE ET AL. *v.* TODD'S VALLEY WATER COMPANY

1857. SUPREME COURT OF CALIFORNIA

8 *Cal.* 443, 68 *Am. Dec.* 338

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

The defendants, a corporation for mining purposes, constructed a ditch in 1851, taking water from the Volcano Canyon. In 1852, the plaintiffs, or those under whom they claim, constructed their ditch, tapping the same stream at a point a short distance below. In their complaint, the plaintiffs allege that the ditch of defendants had been so enlarged since the date of the commencement of plaintiffs' ditch, as to increase the volume of water running therein, to the injury of the plaintiffs. This allegation is denied in the answer. Upon the trial in the court below, the jury rendered a general verdict for defendants. The plaintiffs moved for a new trial, which being overruled, they appealed to this court.

The grounds of error assigned appear in the opinion of the court.

* * * * * * *

Burnett, J., delivered the opinion of the court—Terry, C. J., and Field, J., concurring.

There are two errors assigned by the plaintiffs:

1. That the verdict was against the evidence.
2. That the court erred in giving and refusing instructions.

In reference to the fact as to whether the ditch of defendants had been enlarged so as to increase the flow of the water, the testimony was conflicting. The evidence fills some fifty-two pages of the transcript, and there was ample room allowed for the exercise of the discretion of the jury. It would be exceedingly difficult for any one to come to a satisfactory conclusion as to the real state of the case. And this uncertainty arises from the nature of the subject-matter, and the want of exact estimates at the time. We, therefore, can not disturb the verdict upon the first ground assigned.

On the trial, the court gave this instruction: "In determining the quantity of water in the canyon, appropriated by defendants at the time of the construction of their ditch, which is conceded to have been constructed prior to that of plaintiffs', you will ascertain their intentions from their acts, the manner in which their ditch was constructed, the plan of the work, the general size, etc.

"They would not be limited to the quantity they have turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch, it was not capable of carrying more water than was then diverted.

"If, by reason of boulders or stones in the sides and bottom of the ditch, or irregularity in the grade at that time, it was not capable

of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. But if they continued to divert the quantity only that they originally turned into their ditch a sufficient length of time to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove such obstructions or adjust the grade of their ditch, they would be limited to the amount thus directed, and the plaintiffs would be entitled to the residue."

The plaintiffs excepted to the giving of this instruction, and offered the following, which the court refused to give, and the plaintiffs excepted:

"What amount of water of Volcano Canyon was in the possession, or actually appropriated by defendants or those under whom they claim, at the time of the completion of plaintiffs' ditch, and the actual appropriation of the waters of said canyon by plaintiffs, or those under whom they claim."

We think the instruction given by the court was correct and entirely applicable to the state of facts proved before the jury. And it follows that if the court was correct in giving the instructions, the refusal to give the one offered by plaintiffs was no error.

Judgment affirmed.

MAERIS ET AL. *v.* BICKNELL ET AL.

1857. SUPREME COURT OF CALIFORNIA

7 Cal. 261, 68 *Am. Dec.* 257

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

In the fall of 1851, certain parties, under whom plaintiffs claim, cut a ditch from a certain ravine in Todd's Valley, called Main Ravine. In the beginning of 1852, other parties, under whom defendants claim, cut two ditches from the same ravine, and above the ditch of plaintiffs. This suit was brought to try the right of the parties to the water flowing in the Main Ravine, and to perpetually enjoin defendants from using any of the water, so as to prevent its natural flow to plaintiffs' ditch.

The defendants took the ground that the ditch cut by plaintiffs' grantors was only intended and used as a drain to carry off water from their mining claims, and not to supply water for mining purposes; and that before plaintiffs so applied the water through their ditch, defendants had constructed their ditches and used the water for mining purposes, and thus gained a priority over plain-

tiffs. The evidence was conflicting upon this point, and the court below instructed the jury as follows:

"That if they believed from the evidence that the Main Ravine ditch was constructed prior, in point of time, to the ditch or ditches of the defendants, and the waters of the ravine diverted thereby, it made no difference what the original intention in constructing it might have been, provided the use was not abandoned prior to the time that defendants' rights attached; and that plaintiffs did not lose their rights by varying the use from the original objects of the owners."

The defendants excepted to the giving of the above instructions.

The case was tried by a jury, who found a verdict for plaintiffs, whereupon the court rendered judgment against the defendants for the damages as found by the jury, and perpetually enjoined defendants from using the water in dispute.

Defendants moved for a new trial, which being denied, they appealed.

Burnett, J., delivered the opinion of the court—Murray, C. J., concurring.

Certain instructions were offered by defendants, which were not given by the court, but as no exception was taken, we can not notice the action of the court in this respect.

The first question that arises, and which is the most important one in this case, is whether diverting the water from its natural channel for the purpose of drainage simply, is such an appropriation of that element as to give the party a right as against others who wish to appropriate the water for useful purposes.

In the case of Kelly *v.* The Natoma Water Co., 5 Cal. 105, this court held that "possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."

From this decision, it follows that there must be an actual appropriation, and it would seem clear that such actual appropriation must be for some useful purpose allowed by law. In fact, merely turning the water from a claim with the intention to dispense with its use, is no actual appropriation at all. It also follows, from the same decision, that until such actual appropriation there can exist no complete right to the use of the water, for the party may never carry out his intention. But it was also held in that case that if a party commenced first to construct a work in good faith, then, although his power of enjoyment would not commence until its completion, yet the right, as against others, would have relation to the time of commencement.

From these principles, it would seem legitimately to follow, that if the ditch of plaintiffs was cut for the purposes of drainage simply, and not with the bona fide intention of appropriating the water thus diverted, to some useful object, and the ditch or ditches of

defendants were commenced first in good faith with the intent thus to appropriate the water, and before any actual appropriation by the plaintiffs or their grantors for mining purposes, then the defendants gained a priority over the grantors of plaintiffs, and over all persons holding under them.

Unless the grantors of plaintiffs had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it or intended so to supply it. If, at the time plaintiffs' ditch was made, such intention had existed and been avowed, and afterwards carried out in good faith within a reasonable time, considering all the circumstances, then defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiffs according to its actual capacity at the date of the commencement of defendants' ditch or ditches.

From these principles, it follows that the mere prior construction of a ditch and diverting the waters of a stream will not give the party any priority over others. There must be an actual appropriation, or intention to appropriate, followed by due diligence.

The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another, without affecting his prior right, we express no opinion, as the point does not arise in this case.

The instruction given by the court below was not just to the defendants, because from its terms it did not place the claims of the parties upon the proper grounds, nor state clearly the distinctions necessary to give the jury a correct idea of their duty under the evidence given in the case. For this reason, the judgment must be reversed, and the cause remanded for further proceedings.[19]

[19] See Lower Tule River Ditch Co. *v.* Angiola Co., 149 Cal. 496, 86 Pac. 1081; Colo. Rev. Stat. 1908, § 3176; Thomas *v.* Guiraud, 6 Colo. 530; Rem. and Bal. Wash. Code, § 6340.

WEAVER ET AL. *v.* EUREKA LAKE COMPANY

1860. SUPREME COURT OF CALIFORNIA

15 *Cal.* 271

To the facts stated in the opinion of the court, it may be well to add that defendant showed that one Sisson placed a notice at the outlet of the main lake, about July, 1853, claiming the water of the lakes. These notices were signed "Sisson & Co.," and were placed at different points. Sisson never took any steps toward the construction of a ditch, or the appropriation of the water; made no survey, and placed no stakes. Sisson made one Reed an equal partner and owner with himself; and in June, 1854, sold his share, one-half to Irwin, one of the stockholders in the Eureka Lake Co.—the defendant. In July, 1854, one La Du and others associated with him, commenced the survey of a ditch from the "lake stream," above plaintiffs' flume, to Eureka, the intended terminus of plaintiffs' flume. In the fall of the same year, and in 1855, they built dams across the stream, near the outlet of the lake. The object of the dam is to retain the water of the lakes, to be drawn off at pleasure and used in defendant's ditch which taps the stream below the dam, and above plaintiffs' flume.

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As soon as plaintiffs were prepared to receive the waters of "lake stream," they turned it into their flume. The defendants turned it out again and run it off in their ditch which was situated on the same stream above. Defendant continued to divert the water, and plaintiffs brought suit.

It is unnecessary to set out the instructions to the jury, as they were plain and simple propositions, and when applied to the case in hand, amounted to no more than this: that a bare claim to a water right without some actual steps towards appropriation could confer no rights capable of ownership or sale.

Verdict for plaintiff, with $3,000 damages. Judgment accordingly. Defendant appeals.

* * * * * * *

Cope, J., delivered the opinion of the court—Field, C. J., and Baldwin, J., concurring.

This is an action to recover damages for damming up and diverting the water of certain lakes in Nevada county. The complaint is in the usual form in such cases, alleging a right by appropriation in the plaintiffs, and an improper interference with that right by the defendants. The averments of the complaint are controverted by the answer, and a prior and superior right asserted in the defendants. It can hardly be expected that we will undertake the task

of a critical examination of the testimony, for the purpose of determining whether, upon the weight of the evidence, the verdict was right or wrong. We have so frequently declared the rule upon this subject, it is unnecessary to repeat it again. It is contended, however, that there was no conflict of testimony upon the question of the priority of the rights of the parties, and that upon this point the verdict is entirely unsupported by evidence. If this be true, it, of course, disposes of the case.

Both parties claim the water for mining purposes, and the right of each is based upon the construction of a ditch, by means of which it is alleged that the appropriation was effected. It was shown that the plaintiffs, some time in June, 1853, posted certain notices claiming the water of the Middle Yuba river and its tributaries, and stating their intention to construct a ditch, or flume, and appropriate the same for the purposes mentioned. It was further shown that, in the following months, they commenced their surveys on the contemplated line of the ditch, and that these surveys were, in due course of time, prosecuted to completion, and followed up by the actual construction of the work. It is claimed that the plaintiffs did not prosecute their enterprise with sufficient diligence, and that their rights do not, therefore, date by relation from the commencement of their operations in 1853; but the question of diligence was necessarily passed upon by the jury, and their verdict is conclusive. It is not pretended that the defendants did any act towards the construction of their ditch until the summer of 1854, but evidence was introduced for the purpose of connecting them with a right to the water of the lakes in question, claimed by other parties, who had put up notices of their appropriation early in July, 1853. Irrespective of any question as to the validity of this claim, we think the conclusion of the jury fully justified by, and in strict conformity with the evidence. The notices of the plaintiffs claiming the same water were as valid and effectual as the notices of these parties could have been, and the proof is that they were first posted.

It is proper, in this connection, to notice another question, which is discussed at some length in the briefs of counsel. There are three lakes, the water of which constitutes the subject of this controversy. They are situated one above the other, and discharge their water into the Middle Yuba river through the same channel. This channel is about one mile in length, and is called "lake stream." The quantity of water discharged varies with the seasons. Sometimes the stream is a torrent, and at others it is almost or quite dry. The defendants, for the purpose of creating a supply of water for their ditch during the summer months, erected a dam at the outlet of each of these lakes, by which means it was converted into a sort of reservoir, from which the water was drawn as their necessities required. It is contended that, under the circumstances, the erection of these dams was justifiable and proper, and that the great value

of the lakes as reservoirs is a sufficient justification for injuries resulting to the plaintiffs. We are aware of no principle of law upon which such a position can be maintained. If the injuries to the plaintiffs were of a trivial character, they should, perhaps, be considered *damnum absque injuria*; but a comparison of the value of conflicting rights would be a novel mode of determining their legal superiority.

The question whether the defendants had a right to turn into the lake water obtained from another source, and take out the quantity thus turned in, does not properly arise in the case; for it does not appear with sufficient certainty that any water was so turned in by them during the period in which damages are alleged to have accrued.

We see no error in the instructions of the court. Those to which objections are principally urged relate to the validity of the claim to the water of the lakes purchased by the defendants. The evidence in relation to this claim is perfectly plain and uncontradictory, and, we think, shows conclusively that the claim was invalid, and without the semblance of law to support it. The water was not claimed for any useful or beneficial purpose, or in contemplation of a future appropriation for any such purpose by the parties claiming it. It was a bare claim; for no other object, that we can discover, than that of speculation. The court would have been justified in instructing the jury to disregard it entirely.

Judgment affirmed.

IRWIN *v.* STRAIT ET AL.

1884. SUPREME COURT OF NEVADA

18 *Nev.* 436, 4 *Pac.* 1215

BELKNAP, J.: The original parties defendant in this cause were the same as in Simpson *v.* Williams, ante, 1213. The appeal in this case, as in that, is directed against the decree rendered in favor of respondent, Williams. To each suit he defended as owner of the Page or Withington ranch, on Duckwater creek. The questions presented upon appeal are the same in each case, except the question of prior appropriation of the water. The different plaintiffs acted independently of each other in diverting the stream, and their acts in this regard must be separately considered. Plaintiff Irwin first diverted the water upon the twenty-first day of August, 1867. For the purpose of this case we shall treat his right as commencing, by relation, at this time. The premises in the possession of Williams, and of which he must be considered owner upon this appeal,

were purchased in the month of April, 1867, by Withington from Page for farming purposes. During the year 1866, Page had diverted a portion of the waters of the stream. This diversion may have been for a speculative purpose, and we shall not consider it as the inception of a right. The testimony is not clear as to the use made of the water by Withington during the year 1867, save that it continued to flow as diverted by the dam and ditch constructed by Page. In the spring of 1868, and each succeeding year, Withington, and those claiming through him, have employed the water for irrigating cultivated lands. Upon these facts, when did the right of respondent as successor in interest to Withington to the use of the water commence?

In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence. During the year 1867 Withington did no particular act manifesting an intention to appropriate the water, further than to maintain its flowage upon the land. It was unnecessary for him to do more. The diversion made by Page was suitable to his contemplated appropriation, and a different diversion would not have strengthened his claim. We do not think that, in exercising reasonable diligence to appropriate the water, Withington was bound to use it for irrigation during the year 1867. It may have been impracticable by reason of the season, or the difficulties incident to an unsettled country, to have applied the water to irrigation the same spring in which he made his purchase. Under the facts, we think his appropriation should date by relation to the time he acquired the property, in April, 1867.

The remaining exceptions will not be particularly considered. They were determined adversely to appellant in Simpson *v.* Williams, ante, 1213, and the same ruling will be made in this case.

The judgment and order of the district court are affirmed.

SEAWEARD ET AL. *v.* PACIFIC LIVE STOCK CO. ET AL.

1907. SUPREME COURT OF OREGON

49 *Ore.* 157, 88 *Pac.* 963

MOORE, J.: This is a suit to enjoin interference with the flow of water in the channel of Crooked creek, in Malheur county. The complaint states in effect that the plaintiffs, J. H. Seaweard and Anderson Loveland, are prior appropriators of water from that stream; that the defendant the Pacific Live Stock Company, a cor-

poration, is digging a ditch above their lands and threatening to divert all the water of the creek, to their irreparable injury; and that the defendants Pearl Duncan and Pedro Germain are using water for irrigation to which the plaintiffs are entitled. Germain made default; but, issues having been joined as to the other defendants, the cause was tried, and from the testimony taken the court made findings of fact, and, based thereon, concluded as matters of law that the Pacific Live Stock Company has a prior appropriation of 100 inches of water from the creek, and that the relative rights of the other parties to the use of the water of the stream and the extent of the subsequent appropriations thereof are as follows: Loveland, 150 inches; Seaweard, 120 inches; and Duncan, 80 inches—miners' measurement, under six-inch pressure, all of which rights are superior to the claim of the corporation to the use of any water in excess of 100 inches. A decree having been rendered in accordance with the findings, the plaintiffs and the Pacific Live Stock Company separately appeal.

The testimony shows that Crooked creek is a perennial stream issuing from a spring situated on land owned by the Pacific Live Stock Company and flowing northeasterly through the premises of all the parties hereto, except those of Duncan; that A. J. Morgan and C. W. Hinkey settled upon public lands near this spring, and in 1886 and the following year dug ditches and diverted water from the creek, which they respectively used on the premises claimed by them, and, having secured patents therefor, the title to such lands, by mesne conveyances, became vested in the corporation in 1900; that the plaintiff Loveland made a homestead entry on land below the premises so owned by the Pacific Live Stock Company, and in 1886 diverted water from the creek with which he irrigated his land; that his brother, without any claim of right thereto, took possession of a section of land owned by the Oregon Central Military Road Company, and irrigated a part of it from the creek, which premises are now leased to the plaintiff last named, who was awarded 100 inches of water for the irrigation thereof; that E. W. Crutcher settled on public land situated below Loveland's diverted water from the creek in 1895 for irrigation, and, having secured a patent for his land, conveyed it to the plaintiff Seaweard; that defendant Duncan settled on government land situated below Seaweard's premises, and dug a ditch from the stream mentioned, the head of which is above that of the latter's conduit, and diverted water for irrigation; and that the Pacific Live Stock Company, in 1904, having built a dam in the creek nearer the spring, and commenced to dig a ditch on higher ground, so as to irrigate more of its land than was then possible, this suit was instituted, resulting in a decree as hereinbefore indicated.

The plaintiffs' counsel admit that such corporation has a prior appropriation, but contend that errors were committed in awarding it more than fifty inches of water as the measure of its right, in

not requiring the dam which it constructed to be removed, and in not enjoining the use of any water through the new ditch. The legal principles thus maintained are disputed by counsel for the Pacific Live Stock Company, and they insist that errors were committed in awarding Loveland the use of any water from the creek for the irrigation of the land leased to him, and in not permitting their client to use all the water of the stream, if necessary, in irrigating its lands. We will consider these questions in their inverse order.

An examination of the testimony discloses that from 1899, when Morgan and Hinkey respectively conveyed the real property which the Pacific Live Stock Company now owns, at the head of Crooked creek, until 1904, a period of five years, there was no attempt made to increase the area of such arable land originally irrigated, and that during that time Loveland, Seaweard and Duncan, respectively, appropriated water which the corporation continually permitted to flow in the channel of the stream to the head of their ditches. When an ordinarily prudent person makes a prior appropriation to irrigate arid land of which he is the owner, or in the lawful possession expecting to acquire title thereto, if such land will be benefited by irrigation, and the volume of the stream is sufficient therefor, it is reasonable to suppose that he has in mind both the extent of his land and the amount of the water at the time of his appropriation, and that he intends to reclaim the entire area thereof, either by the ditches constructed at the time or by a canal system then in contemplation. But pioneers on the public domain do not ordinarily possess great wealth, and hence can not rapidly convert arid land into farms; and, such being the case, the law allows a reasonable time in which to complete the appropriation. If the increase in the area of arable land for the irrigation of which water has been diverted varies with and is measured by the lapse of time, the additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants to the use of such water. Simmons *v.* Winters, 21 Ore. 35, 28 Am. St. 727; Hindman *v.* Rizor, 21 Ore. 112; Cole *v.* Logan, 24 Ore. 304; Smyth *v.* Neal, 31 Ore. 105. What is a reasonable time in which to apply water originally intended to be used for some beneficial purpose depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design. Hindman *v.* Rizor, 21 Ore. 112; Nevada Ditch Co. *v.* Bennett, 30 Ore. 59, 85, 60 Am. St. 777. "The appropriator," says a text-writer, "must exercise that degree of diligence which will indicate the constancy and steadiness of purpose and labor usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs, and will manifest to the world a bona fide intention to complete the work without unnecessary delay." Long, Irrigation, sec. 41. The testimony shows that Morgan and Hinkey were constantly enlarging the area of their

arable land until 1899, when they executed deeds thereof; but from that time until 1904 their successors in interest made no attempt whatever to prepare any new land for cultivation, whereby a purpose to expand the appropriation might have been disclosed to persons who desired to make a subsequent use of the water. No cause is assigned for the delay indicated, and, believing it to have been unreasonable, the right of the Pacific Live Stock Company to the use of the water of the creek is limited to the appropriation made by its predecessors in interest, thereby rendering subsequent applications of the excess of such water by others valid. Cole *v.* Logan, 24 Ore. 304.

* * * * * * *

The spring which is the source of the creek mentioned supplies a constant stream, unvarying in the quantity of water that it discharges, which volume the court found to be 800 inches, miners' measurement, under six inches of pressure. There is undoubtedly a surplus of water after supplying the quantity decreed to the several parties, and, this being so, we do not see how the plaintiff can be injured by the maintenance of the enlarged dam or the diversion by the new ditch, as proposed by the Pacific Live Stock Company. If the other parties secure the quantity of water allotted to them, they ought not to complain because of the proposed change in the use by the corporation.

A careful examination of the testimony convinces us that the quantity of water to which the several parties are entitled and the order of their respective rights to the use thereof are correctly stated by the court, and hence the decree is affirmed.[20]

[20] "Before the country was so thickly settled as it is now, the practice for the appropriator of water 'to keep all you get and get all you can' was in many cases tolerated; but, yielding to reason and justice to all, the later authorities have established a different rule. We conceive it to be the law, except as modified by statute, that the right of a prior appropriator is paramount, but the right is limited to such an amount of water as is reasonably necessary for such useful purpose and project as may be fairly within contemplation at the time the appropriation is made. Following the appropriation, the appropriator is entitled to a reasonable time within which, by ordinary diligence, he may complete the project and actually apply the water to the useful purpose intended. What is reasonable, both as to the amount of water and as to the time any given project may be completed, must depend upon the facts and circumstances of each particular case."—Burnett, J., in Andrews *v.* Donnelly, 59 Ore. 138, 116 Pac. 569, 573.

SENIOR ET AL. *v.* ANDERSON ET AL.

1896. SUPREME COURT OF CALIFORNIA

115 *Cal.* 496, 47 *Pac.* 454

HAYNES, C.: Action to quiet title to a water right. The defendants had judgment, and the plaintiffs appeal therefrom, and also from an order denying a new trial.

In 1883 J. D. Hines settled upon one hundred and sixty acres of public land through which a small mountain stream known as "San Antonio creek" flowed, and constructed a dam and ditch by which he diverted from said stream about seventy-nine inches of water, and discharged the same upon said land. No notice of said appropriation is shown to have been made, and its purpose and the quantity of water appropriated can only be determined from its subsequent use. That a valid appropriation may be so made, see Wells *v.* Mantes, 99 Cal. 583. The defendants claim under said appropriation. Edwin Senior, one of the plaintiffs, in 1886 settled upon one hundred and sixty acres of public land below the Hines place, through which said stream also ran, and on October 29, 1887, posted a notice claiming to appropriate fifty inches of the water of said stream, measured under a four-inch pressure, and constructed a ditch to convey the same for use upon his said land. J. D. Hines died in December, 1886, and Alice Hines obtained a patent for the land occupied by J. D. Hines in his lifetime October 25, 1889, and Senior obtained a patent to his land October 30, 1890. The other plaintiffs are vendees of portions of Senior's land and water right. The Hines ranch, above mentioned, was conveyed by Alice Hines to E. S. and W. L. Hall, August 21, 1888, together with the water right appurtenant thereto, and on June 15, 1889, the Halls conveyed said water right—but not the land—to the Ojai Valley Water Company, a corporation. The persons named as defendants are the members of an unincorporated association, or partnership, composed of the stockholders of said corporation, to which association said corporation conveyed its water right May 5, 1894. The agreement by which the association was formed divides the interest acquired into one thousand shares, being the same number of shares issued by the corporation, and the said agreement fixed the number of shares to which each member of the association was entitled. The corporation was thereupon dissolved.

The principal question is as to the sufficiency of the evidence to justify the sixteenth finding, which is as follows: "That J. D. Hines settled upon certain lands riparian to the said San Antonio creek, and above the lands of the plaintiffs in this action, in 1883, and all the water flowing in the said San Antonio creek to and upon the lands

of the said J. D. Hines, in the said year 1883 and ever since, in the ordinary stages of the water, was necessary for uses upon the said land so occupied by the said J. D. Hines for agricultural and domestic uses, and all of said water flowing in the said stream in ordinary stages, and to the amount of 78.77 inches, was diverted from the said stream by the said J. D. Hines and used upon the said lands until the death of the said J. D. Hines, and ever since." Whatever water rights were acquired by Hines were acquired by appropriation. Senior's appropriation having been made prior to the acquisition of title by Alice Hines, no riparian rights attached to Hines' lands which could affect Senior's appropriation. Her patent was expressly made "subject to all accrued water rights"; and as the two appropriations above mentioned, whatever may be their respective quantities, equal or exceed the entire flow of the stream during the irrigating season, the question of riparian rights does not arise in this controversy.

The evidence is quite clear that the capacity of the Hines ditch was practically the same in 1883 that it is now, and that during all the time since 1883 the water ran through it to its full capacity when there was sufficient water in the stream to fill it, and, when there was less, that it was all diverted, except so much—a small quantity—as seeped through the dam by which the water was turned into the ditch. But that is by no means conclusive of the quantity of water appropriated, nor is it, without showing a useful purpose to which the water, or some of it, was applied, evidence of any appropriation. The purpose of the diversion and the use of the water diverted are the general tests of a valid appropriation, as well as of the quantity appropriated. None of the water diverted by the Hines ditch was used upon any other than the Hines land until after the conveyance of the water right by the Halls to the corporation, which was nearly two years after the appropriation by Senior. The extent of the Hines appropriation is therefore not enlarged by the subsequent use of the water by the corporation upon other lands, but must be determined by the use upon the lands for which the water was appropriated. The quantity of land cultivated and irrigated by Hines and his successors until the time of the trial is uncertain, but that no greater quantity of land was cultivated upon the Hines ranch at any time than was under cultivation at the time of the trial is clear, while the preponderance of the testimony is that it was formerly much less.

As to the quantity of land being irrigated upon the Hines ranch at the time of the trial, one of the defendants, W. L. Hall, who is in charge of that property, testified that, at that time, there were "thirty-nine acres in trees, no alfalfa," and that "there are about two hundred acres being irrigated from the same stream now outside of the old Hines ranch." No witness put the quantity of land that is or has been irrigated upon the Hines ranch at more than forty to fifty acres. E. S. Hall, also a defendant, testified as follows: "I am son-in-law of Judge Hines, and took charge of the place after

his death until August, 1888. When I took charge of it in 1887 the flumes and ditches were practically what they are now. The ditch extended down past the house, and the water, after running off the Hines land, went down a little stream or ravine, but did not reach Senior's land again, but would reach the creek again about three miles below, if it did not sink into the sand or earth. The ditch and flume was kept in use continuously as it was possible. Judge Hines intended to hold the water and keep it, and he irrigated the hills for that purpose. He got domestic water from another stream. I do not know how much was irrigated in 1887. In the summer months all the water was turned into our flume, and only seepage would go down to Mr. Senior's flume." A little later this witness repeated the foregoing statement in almost the same words, including the statement that Hines "irrigated the hillsides for the purpose of holding the water." Miguel Erro testified that he commenced to work for Judge Hines in 1883, and helped to construct the ditch and flume; that the land was cultivated "for alfalfa, for orange and lemon trees, and for barley." "It [the water] was taken north of the house, but afterwards ran down the creek right by the house. * * * When I said, in 1883, when the water ran through this ditch and flume, it passed again into the stream, I mean the little creek where the house is. The water may return to San Antonio creek, but it would be way down." George Stewart testified that it was hard to estimate how much Judge Hines had under cultivation. It was in patches; that he used to irrigate a great deal of it for pasturage; that he judged there were about fifty acres irrigated by Judge Hines, altogether, in 1885-86. E. S. Hall, the present occupant of the Hines ranch, testified that it would take forty inches used all the time to irrigate the place properly; that "this year" he had twenty-five inches, and would have been glad to have had more.

There was no evidence tending to show that any portion of the Hines ranch other than that now irrigated is capable of irrigation, or that any larger quantity of water than that mentioned by E. S. Hall is or ever would be required for the cultivation of all the irrigable land on that ranch. This fact, together with the further conceded fact that the water diverted by the Hines ditch is now used to irrigate from one hundred and eighty to two hundred acres of land outside of the Hines ranch, gives great force to the testimony of E. S. Hall, whose relation to Judge Hines gave him ample opportunity to know the facts, that he irrigated the hillsides for the purpose of holding the water, and that water was permitted to flow off in the little stream or ravine which connected with San Antonio creek some three miles below. This evidence clearly shows that the quantity of water claimed by defendants under the Hines appropriation largely exceeds the quantity put to any useful purpose on the Hines ranch, and therefore exceeds the quantity actually appropriated. While the quantity of water appropriated for use upon the Hines land is the measure of the quantity appropriated by Hines, we do not hold that the water

so appropriated may not be used upon other lands; but the fact that other lands may be, or are, irrigated from the Hines ditch, does not affect the quantity of water appropriated. In Atchison *v.* Peterson, 20 Wall. 514, Justice Field, delivering the opinion, said: "The right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right. That is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste, and prevent others from using it for mining or other legitimate purposes." See, also, the California cases there cited, and Simmons *v.* Winters, 21 Ore. 35; Barnes *v.* Sabron, 10 Nev. 243; Hindman *v.* Rizor, 21 Ore. 112.

We do not hold that the Hines appropriation is limited by the quantity of water he could put to a useful purpose upon his land the first or second year, but to such quantity as he could put to a useful purpose upon his land within a reasonable time by the use of reasonable diligence. "To entitle the defendant, however, to the benefit of such an appropriation, he should within a reasonable time apply the water to such beneficial use. As fast as he could reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose. The rule established in Simmons *v.* Winters, supra, is just and reasonable; but it is not intended that, because a prior appropriator is entitled to a given quantity of water necessary to irrigate the lands he intends to cultivate, he can suspend his improvements an unreasonable time, and then, by adding to the area of his cultivated land, be restored to his original intentional diversion, when subsequent appropriators have acquired rights upon the stream. The fact that he for an unreasonable time delays additional cultivation should be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, should be confined to such necessary use as applied to the lands he had cultivated within a reasonable time." Cole *v.* Logan, 24 Ore. 304. See, also, Simmons *v.* Winters, supra, and Barnes *v.* Sabron, supra. We think that the time elapsing after 1883 was ample to bring under cultivation all the land upon the Hines place intended for cultivation by the use of water, and the voluntary disposition by the present owner of the Hines land of so much of the water as is not now used thereon, for use upon the land of others, justifies the conclusion, upon the evidence before us, that the appropriation made by Hines should be restricted, as against the plaintiffs, to the quantity of water now reasonably necessary for the irrigation of the Hines land under cultivation when this action was commenced. We therefore conclude that said finding is not justified by the evidence, though it is immaterial to the plaintiffs where said quantity of water is used, and that the use of the water upon other lands is therefore a false quan-

tity in the problem as to the quantity appropriated by Hines, and whether that quantity has been increased must depend upon the question whether the right to a larger quantity has been acquired by an adverse use for the period of five years, the defense of the statute of limitations having been pleaded by the defendants.

* * * * * * *

The judgment and order appealed from should be reversed, and a new trial granted.

We concur: Belcher, C.; Britt, C.

Temple, Henshaw, Harrison and Van Fleet, JJ.: For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.[21]

McFarland, J., delivered a dissenting opinion which is omitted.

[21] "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters, but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation, as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes. Beyond that his appropriation or diversion of more than can be applied by him gives him no right to the excess, and this is subject to appropriation by any other person who may use it for similar beneficial purposes. While Preadmore had filed a notice appropriating 2,000 inches of water, his ditch, as actually constructed, did not carry that quantity, but it did carry a quantity, when the deed to Brown was made, in excess by one-half of what was being used for beneficial purposes upon his land, and this excess was, at the time he sold the eighty acres to Brown, flowing from the ditch in natural channels through the land conveyed to Brown back into Oak Run creek. In fact, the claim of appellant is that, under the evidence, it is shown that one-half of these waters have been ever since, and still are, flowing down these same channels as natural waste into said creek. As these waters, when Brown purchased his land, were not being devoted by Preadmore to any beneficial use, they were subject to appropriation for use by Brown upon his land without any conveyance from Preadmore. This doubtless explains why, while an undivided half of the ditch was conveyed, there was no specific mention of the water right, probably accounted for by the fact that these waste waters could only practically and effectually be brought upon the lands conveyed to Brown through the extension of the ditch thereover. Be that as it may, however, we are satisfied that under the conveyance to Brown, if it embraced anything more than an interest in the ditch itself as then constructed and a right of way to extend it to his land, it was only a right to take by means of the ditch one-half of the waters which Preadmore was in fact conveying in the ditch, but to which, under his attempted appropriation, he was not entitled because in excess of any beneficial use upon his land and so afford Brown an opportunity to avail himself of a right to such excess, and by applying it to beneficial uses upon his land, acquire a right thereto by appropriation. This neither he nor his successors in title ever did."—Lorigan, J., in Hufford *v.* Dye, 162 Cal. 147, 153-154; 121 Pac. 400, 403-404.

See Wyoming Rev. Stats., § 895; Comp. Laws 1910, § 724.

CITY OF TELLURIDE *v.* BLAIR

1905. SUPREME COURT OF COLORADO

33 *Colo.* 353, 80 *Pac.* 1053

GODDARD, J.: The appellee (plaintiff below) brought this action to enjoin the city of Telluride, appellant, and defendant below, from interfering with the free and uninterupted flow of one hundred and forty miner's inches of water in what is known as "Mill creek," a running stream situate in upper San Miguel mining district, in San Miguel county, Colo. He bases his right to such relief upon the following facts, to wit: That ever since the 1st of March, A. D. 1896, he was the owner of and has operated a saw and shingle mill located upon the margin of said creek; that, for the purpose of operating his said mill, he did, by means of a flume and pipe line, divert from said stream the waters thereof to the extent of one hundred and forty miner's inches, which amount of water was, and still is, necessary for the propulsion of machinery operated in said mill. It appears from the evidence that the flow of water in the stream is insufficient to furnish the full amount of such appropriation after supplying the appellant with one and one-tenth cubic feet of water per second of time, to which it is conceded the city has a prior and superior right, except from April to July, in ordinary seasons. In October, 1899, owing to early snows and rains, there was sufficient water to run the mill. The court below enjoined the appellant from diverting the waters of the creek above the point of diversion by the appellee, except to the extent of one and one-tenth cubic feet per second of time, and ordered and decreed that the city permit the water of the stream, subject to the above exception, to flow down to the point of appellee's diversion to the extent of, and not to exceed, one hundred and forty miner's inches, at such time as the waters in the stream, after the diversion of said one and one-tenth cubic feet, may be sufficient to afford power for the propulsion of the machinery in appellee's mill, with the express proviso that the appellee should not be entitled to have such excess water flow to his point of diversion unless the volume should be sufficient to operate his mill and machinery.

The appellant complains of this decree because the court therein fails to limit the appellee's right to use the water to the periods of time that the evidence shows he has heretofore been able to operate his mill during each year, relying upon the theory that appellee's appropriation was only for those particular periods. We think this objection is without merit. The appellee's appropriation was of an amount of water necessary for the operation of the machinery used in his mill, to wit, one hundred and forty miner's inches of water flowing in Mill creek, subject to any prior appropriation of such

waters. The fact that the volume of water, by reason of climatic conditions, is sufficient for the use intended during certain portions of the year only, does not of itself limit the appropriation to such periods of time, but is available whenever by reason of the flow there is sufficient water for such beneficial use. The decree in no way infringes the rights of the appellant. It rightfully gives the appellee the amount of his appropriation when the volume of water is sufficient for the use intended, while it permits the appellant to divert all of the appellee's water when it can not be so beneficially applied.

The judgment is therefore affirmed.

Affirmed.

Gabbert, C. J., and Bailey, J., concur.

THORP ET UX. *v.* McBRIDE

1913. SUPREME COURT OF WASHINGTON. DEPARTMENT 2

75 Wash. 466, 135 Pac. 228

MORRIS, J.: This is a contest over a water ditch and the use of the water flowing therein. There is much testimony and much conflict, but we find the facts to be as follows: In 1899 appellant purchased the location rights to the commonwealth placer mining claim in Myers creek mining district in Okanogan county and in October, 1901, obtained a patent. No mineral was ever discovered within the boundaries of the placer claim, and it is apparent that the real intent of the location was for town-site purposes upon which to locate the town of Bolster. In October, 1899, appellant constructed a small ditch from Myers creek and conveyed water from the creek to the town site, a distance of about two and three-fourths miles. For part of this distance the water was conveyed through the ditch and the remainder of the way through a small flume; the ditch and flume being over and upon public lands. An attempt was made to appropriate the water by posting and recording a water notice. It is, however, conceded that this notice was deficient and no rights are now predicated thereon. The carrying capacity of the ditch and the amount of water flowing therein can not be determined by the evidence, nor can we find that it was used by the appellant for any purpose other than the washing of gravel for a few hours in the fall of 1899 and a like use in subsequent years, possibly as late as 1904, though the evidence as to this later use is so indefinite and so contradictory that it is difficult to make a finding thereon. Bolster did not prosper, and in 1902 it was and has since remained a deserted village. Upon reaching the town site the water was permitted to run wild; no attempt being made to confine it to any particular

channel or store it for future use. It is probable, although the evidence is not clear, that a small portion of the water was used by the few inhabitants of Bolster as late as 1901. The evidence also discloses that some of the inhabitants obtained water from artesian wells and others from Myers creek. Some use was also made of the water in making a few thousand brick and for mixing plaster. It is also testified to that the water was used for filling the vats used by a small shingle mill, although we are inclined to the view that the weight of the evidence is to the effect that the shingle mill obtained the small amount of water it required first from Nicholson creek and later on, after it changed its location, from Myers creek. It is impossible to determine the amount of water it used, but it must have been a small amount, and, as before stated, the great body of the water after reaching Bolster was permitted to run to waste. The evidence does not disclose any use made of this water by any one at Bolster subsequent to 1901. In 1902 respondents located a homestead upon the lands across which the ditch ran, and appellant informed them they might tap the ditch and make such use of the water as they desired. Later on, and in the same year, they made inquiry as to appellant's right to the water and the ditch and convinced themselves that appellant had no valid right to either, and from this time, while there is much dispute, we are inclined to the view that they claimed the ditch through their lands as their own. There is much dispute as to whether the waters ran in the ditch north of respondents' lands in 1901; but, whether it did or not, it is clear that no beneficial use was ever made of it except for an hour or two. It is also clear that the flume north of respondents' lands was permitted to go to ruin, and no pretense was ever made of repairing it. In 1905 respondents prepared a notice of appropriation of this water, and in October, 1906, the same was posted and recorded. Appellant claims that he made necessary repairs of the ditch subsequent to 1902, which is seriously disputed by respondent; but it is clear that, if appellant did make such repairs, it was not for the purpose of making any beneficial use of the water but because he believed that by so doing he would retain rights to the ditch and water. The court below held that appellant was the owner of the ditch across the respondents' land and had the prior right to the use of the water to the extent of twenty miner's inches under a four-inch pressure, and that the balance of the water belonged to the respondents. From this decree each party has appealed, claiming the right to all the water to the entire exclusion of the other party. We do not understand the theory upon which the decree is based in awarding twenty miner's inches under a four-inch pressure. We find nothing in the record as to any present or contemplated use of such measurement of water. The appellant, so far as we can find, has made no beneficial use of this water since 1902, except that he testified that on one occasion in 1904 he made some slight use of it in connection with some drilling in a prospect hole.

So far as any beneficial use to which appellant has put this water since 1902, it might be held that nonuser has worked an abandonment were it not for the fact that it is evident that there was no intention on his part to abandon it, and, since abandonment must consist of both act and intent, the facts will not justify a holding that there has been an abandonment by nonuser alone; but, while that is true, it is also well established that water must be put to some beneficial use.

Permitting the amount of water awarded to appellant to run through this ditch until it passes north of respondents' lands and then run to waste until in the indefinite future its use will be required in Bolster or in the mining operations near there is altogether too remote and speculative to be favored in the law. Bolster has been nothing but a town site since 1902, and we can find no tangible evidence that it ever will be anything more. The mines referred to by appellant are but prospects. The record does not indicate any benefit to which they have applied this water or any use they ever will make of it. Like the town of Bolster they have no present but live in the memories of the past and in hopes for the future, and the future is based upon visions too remote for the law to recognize. Appellant, when asked to what use he intended putting this water, replied, "Irrigation, mining, domestic and power;" but we can find nothing in the record to make his purpose more substantial than intention. He has made no attempt since 1902 to make any such use of this water, and we hardly think the law will justify him in retaining it and permitting it to run to waste until at some unknown future time it will be required for such purposes as he indicates. It is altogether too remote, speculative and fanciful; and, since his intent is coupled with a purpose too remote and speculative to be recognized in law, it ought not to save him from the consequences of his nonuser. The evidence discloses no present "irrigation, mining, domestic, or power" uses to which this water can be applied either by appellant or others, and to say that its use shall be preserved because of some future use that might be developed is to grant the use of waters for no other use than that of speculation which the law will not justify. Weaver *v.* Eureka Lake Co., 15 Cal. 271.

The judgment is reversed upon respondents' cross-appeal, and the cause remanded, with instructions to grant respondents the relief prayed for and their costs.[22]

Crow, C. J., and Fullerton, Main and Ellis, JJ., concur.

[22] Cf.—Sowards *v.* Meagher, 37 Utah 212, 108 Pac. 1112; Nevada Ditch Co. *v.* Bennett, 30 Ore. 59, 45 Pac. 472, 60 Am. St. 777; post, p. 353.

BARROWS ET AL. *v.* FOX ET AL.

1893. SUPREME COURT OF CALIFORNIA

98 Cal. 63, 32 Pac. 811

BEATTY, C. J.: The plaintiffs in this action are successors in interest to an appropriator of running water. The appropriation was made at a time when all the lands affected were public lands of the United States, and by means of a ditch and flume through which the water diverted from the stream was conducted to the lands now owned and occupied by the plaintiffs, where it was applied to irrigation, watering stock, and domestic purposes. The diversion and use of the water for these purposes and by these means had been continued for more than thirteen years prior to the trial of the action in October, 1890. The defendants, long subsequent to the appropriation by plaintiffs' grantor, became the owners of riparian lands through which the stream flows in its natural course below the dam maintained by plaintiffs for the purpose of forcing the water into the head of their ditch. The lands of plaintiffs are not on or adjacent to the stream, and no surplus or waste water will flow from their lands back into the stream, above or within the limits of defendants' lands. In the summer of 1890 the defendants, for the purpose of diverting the water from the plaintiffs' ditch and flume, and bringing it upon their own lands, tore out plaintiffs' dam, whereupon this action was commenced for damages, injunction, etc. The defendants answered, contesting plaintiffs' claims, and asserting their own claims, not only as riparian owners, but as appropriators, and praying for affirmative relief. The cause was tried by the court, and a decree rendered, defining the rights of the respective parties, and enjoining each from interfering with the other. From this decree, and from an order denying their motion for a new trial, the plaintiffs appeal.

The appeal from the order may be disposed of in few words. There was no error—none certainly that could possibly have prejudiced the plaintiffs—in any of the rulings made by the superior court during the trial, and we find in the record evidence sufficient to sustain the findings which are attacked. The principal objection to the findings is that they limit too strictly the extent and character of plaintiffs' appropriation. In effect, it is found that the appropriation did not exceed eleven inches of water, and that this quantity can not be beneficially applied for the purpose of irrigation on plaintiffs' lands more than fifteen days in each month during the irrigating season, i. e., from June to November, inclusive, in each year. There is evidence to sustain this finding and to support the conclusion that the diversion by plaintiffs of the entire eleven inches during other months, or for more than fifteen days in each irrigating month, would merely result in a waste of the waters of the stream upon non-

riparian lands. It is also found that for domestic purposes and for watering stock the plaintiffs require no more water than will flow through a three-quarter inch iron pipe laid from the point of diversion to plaintiffs' lands on the grade of their ditch and flume. There is evidence, not very satisfactory perhaps, but sufficient to sustain this finding in the terms in which it is made, the only difficulty being that it fixes no quantity of water, and is incapable of fixing it in the absence of a pipe such as that described; and the fact is that the plaintiffs have not, and have never had, a pipe of any description, but only an open flume and ditch. This difficulty, however, does not result from lack of evidence to support the finding, though it does, as we shall see, affect that portion of the decree which is based upon it.

We come next to consider the points urged in support of the appeal from the judgment.

1. The superior court did not err in enjoining the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on nonriparian lands. The extent of an appropriation is limited, not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow. Civil Code, sec. 1411; Peregoy *v.* McKissick, 79 Cal. 572.

2. But we think the decree of the superior court in attempting to enforce this principle goes in one respect too far, and is in another particular too uncertain and indefinite to be capable of enforcement. The findings nowhere determine the quantity of water diverted by plaintiffs. All that they establish is the quantity which plaintiffs have a right to use on their lands for irrigation and other purposes. But plaintiffs are enjoined against any diversion from the stream in excess of the quantity which they are found to be entitled to use on and at their lands. There is always and inevitably a difference between the quantity of water diverted from a stream and the quantity which reaches the place of use when conducted for any distance through an open ditch or flume, and, when the only fact found is the quantity of water used, this is not a sufficient basis for an injunction limiting the diversion. These remarks apply with especial force to that part of the decree which limits plaintiffs' right of diversion for stock and domestic purposes to the quantity of water which will flow through a three-quarter inch pipe. The plaintiffs, as we have seen, have no pipe of any dimensions, and they are not only not obliged to put in a pipe, but they have no right to do so, in the lands of other parties through which their ditch is shown to extend. Allen *v.* Water Co., 92 Cal. 138. The quantity of water which they are allowed to divert at all times for stock and domestic purposes is

therefore undetermined, and incapable of determination except by means legally impossible, and the decree is therefore erroneous. It is also erroneous for the further reason that the plaintiffs have the right to divert from the stream a quantity of water sufficient to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch and flume well constructed and kept in good condition. Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means can not be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste. The judgment is reversed, and the cause remanded to the superior court, with directions to modify its decree to conform to the views herein expressed, and for that purpose to take such additional testimony and make such additional findings as may be necessary.[23]

We concur: Harrison, J.; Garoutte, J.; Paterson, J.; Fitzgerald, J.

[23] "Another objection to plaintiff's recovery, interposed in various ways and at divers times, is that the natural waters of the stream were appropriated up to its full capacity, during the ordinary flow, by other appropriators whose rights attached before plaintiff's appropriation was made, and as the prior appropriations exhausted the entire ordinary natural flow, there was no water left in the stream with which plaintiff could irrigate his lands; therefore he could not have sustained any damage as the result of defendant's acts, because he had no right that was thereby infringed. This is a fallacious contention. As we have already seen, plaintiff acquired valid rights as the result of his direct appropriation from the stream, and to the overflow of the stream for his meadow lands, and these rights were vested before defendant began the construction or operation of its mill. Plaintiff's rights were, of course, paramount to any rights defendant had in the waters of the stream. Indeed, defendant claims no rights whatever to the natural waters, but only the right to discharge polluted water into the stream. Plaintiff's rights were subject only to the rights acquired by prior appropriators of the water for some useful purpose, and his right, as well as theirs, as against defendant, is to have the natural waters and all accretions come down the natural channel undiminished in quality as well as quantity. Though other appropriations, to the full capacity of the stream during its ordinary flow, were made before plaintiff's rights accrued, this does not prevent him from building a ditch and diverting and using its waters whenever his seniors do not need it. Floods often occur, and the natural flow of the stream is thus augmented. No appropriator uses water all the time. It is well known that many streams of this state are over-appropriated; yet appropriators whose rights accrue after the ordinary flow is fully appropriated have, nevertheless, acquired valuable rights, and often enjoy the use of water for their lands, which rights the law protects against trespasses of others. When the demands of the senior upon the stream cease the rights of the junior attach, and, as against a wrongdoer like the defendant, the junior is entitled to protect the stream from pollution, the same as if he were the senior and only appropriator. If the acts of defendant interfere with such rights of plaintiff, as they have, defendant must be held responsible for the resulting injury."—Campbell, J., in Humphreys Tunnel and Mining Co. *v.* Frank, 46 Colo. 524, 105 Pac. 1093, 1096.

LITTLE WALLA IRRIGATION UNION ET AL. *v.* FINIS IRRIGATION CO. ET AL.

1912. SUPREME COURT OF OREGON

62 Ore. 348, 124 Pac. 666

Action by Little Walla Irrigation Union and others against Finis Irrigation Company and others. From a judgment establishing water rights, both parties appeal. Modified and affirmed.

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EAKIN, C. J.: There is a great conflict in the testimony as to the duty of water on this land, namely, the actual amount needed for the use to which it is to be applied, and this is the limit to which a party is entitled, regardless of the fact that he may have actually diverted much more water for a long period of time.

Neither the law nor the decisions of the courts have fixed a definite or uniform amount as constituting the duty of water for irrigation in all cases, but it depends upon the character of the soil, the climate, and other conditions, as well as the manner of its application. There is no doubt that the methods of irrigation in Eastern Oregon have not been so economical as to obtain the best results with the least amount of water, and when conservative methods are adopted it may be found that much less water is necessary than has generally been used. In many cases which have been presented to the courts the testimony has tended to establish, and the courts have allowed, for the average soil, such as loam, clay, or sagebrush land, one inch to the acre. In a few cases where the soil has been gravelly or upon a gravelly subsoil, as much as two inches to the acre has been contended for and allowed. This has been based on the testimony as to the need, when used under the ordinary methods then in vogue, in which little attention was paid to systematic or economical application of the water. It is the policy of the law that the best methods should be used and no person allowed more water than is necessary, when properly applied, and thus a larger acreage may be made productive by its extended application. However, the difficulty is to determine just the amount of water which will produce the best results under proper methods in each particular case, and this can not be actually determined until tested by a practical demonstration.

In this case we have a large body of land which has been irrigated almost a lifetime. These old settlers took advantage of the United States statute of 1866, authorizing settlers to acquire title to the use of water in this manner, and they have secured it, at least to the amount needed and used, and now an effort is being made to reduce the amount to which they supposed their title was perfect. Their methods of use have been those which were the least expensive, and, no doubt, to some extent were extravagant, yet they can-

not be expected to install methods now that might reduce to a minimum the amount of water necessary, at a cost that would absorb the profits. A great saving in the amount of water may be possible by adopting the government reclamation methods (cited as authority here) of cement ditches, to prevent both seepage and evaporation, with experts to follow and apply the water, by which it is contended that a half inch to the acre is sufficient; but at this time it is to some extent an experiment whether the investment on that basis will be remunerative, at least on the small farms. Furthermore, these government projects are for a new and an original use of water, upon which the government can impose such terms as it may see fit. Here the users have acquired the land and applied the water, which are valuable under present conditions, and their rights therein are vested, and we can require them only to use the water economically and reduce the quantity to a minimum by reasonable and cheap methods according to their situation and condition.

There are more than three hundred owners of small tracts along this river, and a few of them only town lots. With but few exceptions the tracts are less than ten acres, probably a great bulk of them less than five acres, which the owners seek to make lucrative by raising fruits, berries and vegetables. Upon such small tracts more water to the acre is needed than on larger tracts, and a great expense in the method of conveying and applying the water can not be afforded.

* * * * * * *

C. L. Swain and O. L. Waller, who were called by plaintiffs as witnesses, are experts in the measurement of water; but their knowledge of the duty of water is derived largely from hearsay, theory and observation of its use upon land in another locality. They fix the amount of water needed upon volcanic ash land as one-half inch to the acre; but upon other soil of the valley from one and one-half to two inches; upon coarse gravelly soil, two inches to the acre. Other witnesses, not experts in measuring or estimating water, but with experience in applying it in irrigation, testify that the ground needs more than one and one-half inches. Plaintiffs cite the testimony of A. Miller, as to the need of water on his volcanic ash land; but in his case the water is raised directly upon the land and is carried for distribution in board gutters, so that there is little if any loss by seepage or evaporation, which fact must be taken into account in considering his estimates. The two hundred and fifty gallons per minute, raised by his pump, equals .554 second feet or .31 inches per acre, so that his testimony as to the amount needed on the land under the Milton ditch does not vary much from that of Swain and others, viz., one and one-half inches.

The lands of Rogers and Shaw, who testified to the amount of water they use, and the amount needed, are located down the valley where the subsoil is full of water from the irrigation above, as indicated by the Rogers underground ditch, above mentioned. As to the

smaller tracts, several in one locality should rotate in the use of water, so that each may have a larger head while applying it, with less waste. Although there may be some tracts that need less water than others, they have not been segregated or identified, and we find that, except as to the Miller tract, an inch and a half, miner's measurement under six-inch pressure, per acre, is necessary and sufficient to irrigate the lands of the defendants, except tracts in vegetables and small fruits, which require two inches to the acre.[24]

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EMPIRE WATER AND POWER CO. ET AL. *v.* CASCADE TOWN CO.

1913. CIRCUIT COURT OF APPEALS OF THE UNITED STATES, EIGHTH CIRCUIT

205 *Fed.* 123, 122 *C. C. A.* 355

This is an appeal from a decree in favor of the Cascade Town Company perpetually enjoining the Empire Water and Power Company and its officers from interfering with the normal flow of the waters of a stream in Cascade canyon, near Colorado Springs, Colo. The facts appear from the statement of the trial court, as follows:

[24] "In making such order it may be stated that the evidence does not show definitely what amount of water is actually diverted by the ditch, nor what amount is necessary or has been applied to use on his lands by respondent, nor at what periods during the irrigating season there is the greatest necessity for such use by him. In this situation it may be suggested that upon a new trial these matters should be ascertained as far as it is practicable to do so. If there is not water enough (and this appears to be the fact) to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the court may by its decree fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights. In doing so, the court should recognize the paramount and primary right of the respondent to the first flow in a full ditch and the use of all of it, or a lesser quantity, for given periods during the irrigating season, as it may be required. If this can be done so that by giving respondent the first flow for a week or every other week, or on certain days in the week, and the appellant the right thereto in the intervals, the wants of respondent are fully supplied, he obtains all he is entitled to and has no ground of complaint. While this remedy of rotation and use of waters for irrigation purposes has been more generally applied as between riparian proprietors (Wiggins *v.* Muscupiabe, &c. Co., 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. 337; Smith *v.* Corbit, 116 Cal. 587, 48 Pac. 725), in principle there is no reason why it should not be made applicable as between claimants by appropriation. It is applied as between riparian owners to permit the beneficial use of the waters by all, and as by appropriation only the right to a beneficial use is acquired, there is no reason why, when it can be justly made applicable, the same rule of rotation should not be applied as between appropriators."—Lorigan, J., in Hufford *v.* Dye, 162 Cal. 147, 160-161; 121 Pac. 400, 406.

On measurement and duty of water, see Wiel, Water Rights (3d ed.), §§ 486-489; Henning's Gen. Laws of Cal., 1914, p. 2183, Act 5489, § 42.

"Complainant, the Cascade Town Company, owns several hundred acres of land up Ute Pass, about eleven miles from Colorado Springs. Fountain creek flows through Ute pass in an easterly direction, and as it passes the lands of the complainant company its waters are augmented by those of Cascade creek, short in length of flow, but precipitous, which come down from the watershed of the northerly slope of Pike's peak to the westerly. The said complainant company and its predecessors in title have owned these lands for many years, and began improving them as a summer resort more than twenty years ago, and have maintained them as such ever since, and have not sought to utilize them otherwise. For that purpose they have constructed hotels there and built cottages, roads and trails on its land extending up through Cascade canyon, through which the stream of the same name flows, and on beyond into the mountains, laid out, dedicated to the public, and improved a small park in said canyon, made a lake and fountain, built a pavilion or auditorium for conventions, and otherwise improved its grounds, thereby adding to the attractions of the place as left by nature. The complainant company and its predecessors are not, and were not, municipal corporations, but business ventures created for the purpose of maintaining their property as a resort for tourists during the summer season. The place is known as Cascade. The Midland Railway, which traverses Ute pass, has a station there. The complainant company has sold some of its property to persons who desired to improve the same as summer homes, one of whom has spent about $15,000 in improving his home on land bought from the company, lying on both sides of Cascade creek just below the canyon. The company obtains an income from those who stop at its hotels and enjoy other accommodations which it offers. It has spent a large amount of money in improvements. The roads and trails up Cascade canyon and on into the mountains were constructed at an expense of $15,000 or $20,000. It also built a small water-works to supply the cottages and its hotels. It advertises the place for the purpose of inducing the public to go there, and for the past quarter of a century it has been visited annually by twelve thousand or fifteen thousand people. It has a permanent population of fifty or sixty people. Among other attractions held out in its advertisements are Cascade canyon and the falls of Cascade creek through the canyon. The canyon and falls are rare in beauty and constitute the chief attraction. Without them the place would not be much unlike any other part of Ute pass. The canyon is about three-quarters of a mile long and very deep; its floor and sides are covered with an exceptionally luxuriant growth of trees, shrubbery and flowers. This exceptional vegetation is produced by the flow of Cascade creek through the canyon and the mist and spray from its falls. Some of these falls are as much as thirty feet in height, but the difference in elevation between the foot and the head of the canyon is so great that the falls are almost continuous from the head down. The volume of water is the greatest during the sum-

mer season. It comes from the melting snows on the north slope of Pike's peak. But the flow is fairly even, due to the fact that the upper stretches of the watershed are composed of disintegrated granite into which the water first sinks and gradually percolates until gathered into the bed of the stream. The volume is said to be equivalent to a stream about eight feet wide and six to eight inches in depth. The vegetation in the canyon and up its sides consists, in part, of pine, spruce, fir, balsam, aspen, black birch, Japanese maple, thimbleberry, wild cherry, choke cherry and aster, columbine, larkspur, wild rose, the red raspberry, wild gooseberry, ferns, mosses and many other kinds of trees, shrubs and flowers. The stream is annually stocked with trout. The birds which are found in the canyon, some grouse, a few squirrels, and perhaps a few other wild animals there, are protected by the complainant company. The complainant called a florist of twenty-five years' experience and a landscape gardener of thirty-five years' experience as witnesses. They tell us that the native flora of the country is quite extensive in Cascade canyon; that the evergreen features are perfect; that there are three or four varieties of pines, three of juniper and three of spruce, probably twenty-five varieties of native shrubs, about fifty varieties of native perennials, and several varieties of moss growth, and a large variety of wild flowers and flowering shrubs; that the waterfalls create a spray and mist which, together with the underground seepage down the sides of the canyon, produce this very luxuriant growth, there being at least two hundred varieties of vegetation; and that it is far superior in that respect to any other canyon in the neighborhood, and exceptional. The seepage and the mist and spray give life to the foliage.

"The defendant was incorporated for the purpose, among other things, of generating electricity by water power, and to dispose of the same as a commodity; and to execute that purpose it sent its agents on to the watershed of Pike's peak, above the head of Cascade canyon, and located a reservoir site and did some acts, at small expense, looking to the execution of that purpose, whereby it intended and expected to impound the waters in such reservoir and later conduct it in pipes down the mountain to and beyond the property of the complainant company. And thereupon these complainants filed their several bills asking that the defendant be enjoined from so doing, as a threatened injury to their vested rights.

"It is found as a fact that if the defendant do impound the waters of Cascade creek above the falls and conduct it therefrom in pipes, as aforesaid, the falls in the canyon and the vegetation on its floor and sides will be largely, if not wholly, destroyed, and the canyon hence become a dry gulch, and that all the waters flowing in said stream are needed by complainant company, and are necessary for the aforesaid purposes to which they have been applied by said complainant."

* * * * * * *

Before Sanborn, Hook and Smith, Circuit Judges.

HOOK, C. J.: * * * The waters of natural streams in Colorado are subject to state regulation, and may be appropriated to beneficial uses for domestic, agricultural and manufacturing purposes. That is the prescribed order of preference in case of deficiency. The defendants, who were enjoined, contemplated a use for manufacturing. In this branch of the case the controversy was over the character of complainant's use, its relation to that proposed by defendants, and the extent of complainant's appropriation and application of the water. It is urged that a use for a summer resort is not a beneficial use for either domestic or agricultural purposes. Counsel say that the views and standards of the early settlers were reflected in the state Constitution, and that it should be construed accordingly; that they did not plan for rest and recreation, and that to them "domestic" had to do with sustenance for man and beast, and cleanliness; and that "agricultural" related to the raising of crops. We think such a view is too narrow. If the commerce clause of the federal Constitution had been construed in that way, much of the growth of this country would have been arrested. In framing constitutions wisdom frequently requires the use of general terms, which should be held as progressively adaptable to natural development and as open to embrace new instances as they arise and come clearly within the spirit of the provisions. Thus, in Lamborn *v.* Bell, 18 Colo. 346, 20 L. R. A. 241, the term "milling purposes" in the provision of the state Constitution authorizing the appropriation of private property was held broadly to include manufacturing purposes and specifically that of an electric power plant, though the milling of ore and grain was doubtless uppermost in mind when the Constitution was adopted. Places such as that described here, favored by climatic conditions, improved by the work of man, and designed to promote health by affording rest and relaxation are assuredly beneficial. They are relatively as important as sanitariums or hospitals, and should not be dismissed by calling them mere resorts for idleness. They are a recognized feature of the times, are important in their influence upon health, and multitudes of people avail themselves of them from necessity. Cascade is well described as a place of this kind. With its railroad station, hotels, cottages, water-works, park, roads and trails and its twelve thousand or fifteen thousand annual visitors, it is a summer city. That it is not an incorporated municipality, but is largely a private venture, is, we think, unimportant. Nor need the purpose to which the waters of the stream are devoted be a single one of those named in the classification in the Constitution. It need not be exclusively domestic nor exclusively agricultural. It may be and is both, like that of the ordinary city with its homes, business places, parks and public grounds.

It is clear that complainant intended to appropriate the waters of the stream to its purpose. The intent was openly manifested by the extensive improvement of its property by buildings, roads, etc., in

reliance, not only on the use of the water in the ditches that were constructed, but also on the continued natural falls and flow of the stream. At this point, however, we experience the most difficulty with complainant's case. The laws of Colorado are designed to prevent waste of a most valuable but limited natural resource, and to confine the use to needs. By rejecting the common-law rule they deny the right of the landowner to have the stream run in its natural way without diminution. He can not hold to all the water for the scant vegetation which lines the banks but must make the most efficient use by applying it to his land. See Schodde *v.* Water Co., 224 U. S. 107, 32 Sup. Ct. 470, 56 L. ed. 686, a case from Idaho, where a landowner claimed the whole current of a stream to raise part of the water to his land. The case before us is exceptional, but we think complainant is not entitled to a continuance of the falls solely for their scenic beauty. The state laws proceed upon more material lines. Complainant also relies upon the distribution by the falls of moisture for the trees and other vegetable growth on its lands, which it has extensively improved. As we have said, its intent to appropriate the waters has been shown by its expenditures and improvements beyond what is served by its ditches. Has there been that actual application which the law requires? Undoubtedly a landowner may rely upon an efficient application by nature, and need do no more than affirmatively to avail himself of it, Thomas *v.* Guiraud, 6 Colo. 530; Larimer, etc., Co. *v.* People, 8 Colo. 614; but the use in that way should not be unnecessarily or wastefully excessive. If all the water flowing over the falls, directly applied to the lands in the usual way of irrigation, would be required to produce the effect of the distributed mist and spray as now utilized, we think defendants would have no right to divert it for a manufacturing purpose. If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary. But the trial court based its decision of this branch of the case largely upon the artistic value of the falls, and made no inquiry into the effectiveness of the use of the water in the way adopted as compared with the customary methods of irrigation. In all other respects the conclusions of the court were in accord with the views we have expressed. It may be that if the attention of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberally and not narrowly regarded, and we are constrained to follow it.

As to some other matters: We think the trial court has jurisdiction of the subject-matter of the case, that the necessary amount or value is involved, and that complainant's bill is sufficiently broad for protection of its rights acquired by appropriation.

The decree of the trial court is reversed and remanded for further proceedings in conformity with this opinion.

SCHODDE *v.* TWIN FALLS LAND AND WATER COMPANY

1912. SUPREME COURT OF THE UNITED STATES

224 U. S. 107, 32 Sup. Ct. 470, 56 L. ed. 686

Mr. Chief Justice WHITE delivered the opinion of the court:

* * * * * * *

The court below summarized the averments of the three counts of the complaint, and as that summary accurately and sufficiently states the case, we adopt and reproduce it, as follows:

"Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake river, containing in the aggregate 429.96 acres. Two of these tracts, containing 263.96 acres, are on the south bank, and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land and the other is partly agricultural land and partly mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest, and in 1895, the plaintiff himself, appropriated certain quantities of water of the flow of Snake river for use on said lands. In the first count the quantity is stated in cubic feet per second; in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1,250 miner's inches. Soon after this water was appropriated the parties in interest erected water wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels were erected opposite or near the tracts on the south side of the river, and two near the tract on the north side of the river. These wheels vary in height from twenty-four to thirty-four feet. The parties also constructed wing dams in the river, adjoining or in front of the lands owned by them, for the purpose of confining the flow of the water of the river, and raising it at such points above the natural flow of the river, so that the current would drive the water wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches, and used thereon to irrigate and cultivate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed, that the river at this point runs between high banks, and that the water is lifted by the wheels at least twenty feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake river at a point about nine miles westerly from and below the lands of the plaintiff. The work was

prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake river flowing at said point, and to raise the water about forty feet in height. It is alleged that when defendant's dam was filled with water, the water was turned into a canal known as the 'Twin Falls canal,' owned by the defendant and located on the north side of the river; that this canal was constructed at a cost, as plaintiff is informed and believes, of $1,500,000 for the purpose of supplying water for irrigation and domestic purposes to the settlers on about three hundred thousand acres of arable and arid lands situated below the dam; that for said lands and for a great number of people, being, as plaintiff is informed and believes, five thousand in number, there is no other supply available for irrigation, stock, domestic or manufacturing purposes, except the water from said canal. It is alleged that by reason of this dam the waters of Snake river have been backed up from said dam and to and beyond plaintiff's premises, and have destroyed the current in the river by means of which plaintiff's water wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water wheels or flumes, or to build or construct other dams or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff has not been able to irrigate said lands or any part thereof, or to raise profitable crops thereon, or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake river; that by reason of the backing up of said water and stopping the plaintiff from using said water wheels to raise the waters of Snake river to and upon said lands, and cutting off the water supply from plaintiff's lands, he has been damaged in the aggregate sum of $56,650.

"In the first count of the complaint a separate and distinct cause of action is alleged in an averment that about twelve acres of plaintiff's land has been covered by the waters of Snake river, backed up by defendant's dam, but the land is not described or its boundaries given, or any particulars stated, so that the land can be identified or ascertained. To this cause of action defendant interposed a special demurrer on the ground of uncertainty and the improper joinder of two separate causes of action. This special demurrer appears to be admitted.

"The defendant also interposed a general demurrer on the ground that the facts stated in the complaint do not constitute a cause of action against the defendant as to either or any of said counts. The

demurrer was sustained by the circuit court, and the plaintiff has brought the cause to this court upon a writ of error." 161 Fed. 43, 41 L. R. A. (N. S.) 101n.

The trial court recognized fully the right of the plaintiff to the valume of water actually appropriated for a beneficial purpose. It nevertheless dismissed the complaint on the ground that there was no right under the Constitution and laws of the state of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses. The court did not find it necessary to deny that power might be one of the beneficial purposes for which appropriations of water might be made, but in substance held that to uphold as an appropriation the use of the current of the river to the extent required to work the defendant's wheels would amount to saying that a limited taking of water from the river by appropriation for a limited beneficial use justified the appropriation of all the water in the river as incident to the limited benefit resulting from the use of the water actually appropriated. The court said:

"It is conceded and is beyond question, that the statute law as well as judicial authority directly protects plaintiff in all the water he has actually appropriated, diverted, and used; but there is no statute, nor, so far as known, any judicial rulings, protecting him in the establishment and in the use of his water wheels, as he claims to, and must, use them for the diversion of water to his land."

Again:

"As by art. 15, sec. 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it follows that all water that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated; but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation,—it it not reasonable."

After pointing out the limited right of appropriation for beneficial use which had been exercised, considering the quantity of water actually appropriated and the use to which that water was put, the court came to state the vast extent of the incidental appropriation, having no proper relation to beneficial use, which would result from admitting the theory that the plaintiff, because of his limited appropriation for a named beneficial use, had the power to appropriate the entire current of the river for the purpose of making his actual and limited appropriation and meager beneficial enjoyment fruitful. The court said:

"The only way in which his wheels can be used for the purpose he intended them is to preserve the river in the condition it was when he erected them. And with what result? it may be asked. It may

be stated as a fact that the banks of the river and the adjacent country sustain such relations to each other that the latter can not be irrigated by ditches cut from the river in its natural state, and the erection of dams becomes a necessity, which, of course, changing the surface elevation of the water, affects the plaintiff's premises and all others similarly situated. Then, without the dam, the Twin Falls scheme, with all its present great promise, fails. Not only this, but the government is now constructing a dam across the river some distance above plaintiff for another extensive irrigating scheme, known as Minidoka Project, which will take a large amount of the water, and so much that probably there will not be enough left, especially at low stages of the river, for the full operation of the plaintiff's wheels. * * * "

Illustrating the subject, the court said:

"Suppose from a stream of 1,000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100; could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1,000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches; can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation. In effect this is substantially the principle that plaintiff is asking to have established."

The court of appeals, in affirming the decree of dismissal, did so for substantially the reasons which controlled the trial court. The court of appeals said:

"The assignments of error present the single question whether the facts stated in the complaint constitute a cause of action against the defendant. It is not denied that the plaintiff has the right by appropriation to divert 1,250 miner's inches of waters of the Snake river, mainly for irrigation purposes, and it is not charged by plaintiff that this amount of water is not still in the river, subject to his right of appropriation and diversion. His claim is that he can not divert it by the means he first adopted for taking the waters from the river, and that the defendant, by placing a dam across the river, has deprived him of the right to the current of the river which, prior to the erection of the dam, rendered his means of diversion available. Is this current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location, and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any case—and we know of none—where either of these propositions has been upheld."

After elaborately reviewing the general principles upon which the law of appropriation rested, and referring to provisions of the Constitution and statute law of Idaho, and the decisions interpreting and enforcing the same, it was held that the extent of beneficial use was an inherent and necessary limitation upon the right to appropriate. Pointing out the disastrous results which would follow from any other view, the court said:

"If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises, and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated."

And in this connection, in conclusion, it was observed:

"There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. In Basey *v.* Gallagher, 20 Wall. 670, 683, 22 L. ed. 452, 454, 1 Mor. Min. Rep. 683, the Supreme Court of the United States said: 'Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.'

"In Fitzpatrick *v.* Montgomery, 20 Mont. 181, 187, 63 Am. St. 622, the Supreme Court of the State of Montana, after referring to what has been just quoted from Basey *v.* Gallagher, said: 'While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the Constitution to be a public use. Const., art. 3, sec. 15. It is easy to see that, if persons, by appropriating the waters of the streams of the state, became the absolute owners of the waters, without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section

of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free use of water by appropriations.' "

We have freely excerpted from the opinions of the courts below because, in our judgment, they so clearly portray the situation, and correctly apply the law to that situation as resulting from the Constitution and statutes of Idaho and the reiterated decisions of the court of last resort of that state, which are referred to in the margin, that we might place our decree of affirmance upon the reasons which controlled the courts below.

* * * * * * *

As we have pointed out, the court below did not question the right of the plaintiff to take by proper means from the river the quantity of water actually appropriated by him for beneficial use, and our decree of affirmance will, therefore, not in any way affect such rights.

Affirmed.[25]

ORTMAN ET AL. *v.* DIXON ET AL.

1859. SUPREME COURT OF CALIFORNIA

13 *Cal.* 33

The facts appear in the opinion. The court below decreed:

1st. That defendants were first entitled to the water flowing in Mill creek for the use of their saw-mill.

2d. That plaintiffs were entitled to the use of a sufficient quantity of the water of the stream to fill and supply their Ditch No. 2, at such times as the defendants were not using the same to propel their mill.

3d. That plaintiffs were entitled to the water to fill their Ditch No. 2, in preference to the ditch of defendants, No. 3.

4th. That when plaintiffs' ditch is filled according to its capacity to contain water, then, if there remain any surplus of water flowing in the stream, the defendants are entitled to have such surplus.

Defendants appeal.

* * * * * * *

Baldwin, J., delivered the opinion of the court—Terry, C. J., concurring.

Bill filed for an injunction against the defendants, to restrain them from turning the waters of a stream, called Mill creek, into a ditch constructed by them, known as Ditch No. 3, as marked on the map accompanying the pleadings.

Two main questions arise on the record: 1st. Can a water right be conveyed by bill of sale not under seal? and 2d. Has the prior

[25] Cf.—Huffner *v.* Sawday, 153 Cal. 86, 94 Pac. 424, p. 192, supra.

locator of a water privilege the right to change the point of diversion from the main stream under the facts hereafter stated?

* * * * * * *

Second—The second question is of more difficulty; it involves the necessity of an examination of the particular facts in connection with which it is made. In the fall of 1851, the first ditch was constructed, designated on the map filed as Ditch No. 1, for the purpose of conveying the water flowing in Mill creek to Atchinson's bar. Ortman first commenced the building of the ditch, and constructed it only a few rods. It was afterwards extended by the miners in that locality to the claims on Atchinson's bar. It appears, when first located, to have been used as common property. No charge was ever made for the waters it conveyed, and the miners indiscriminately repaired the ditch and took the water as they required it to wash their dirt. It was not reputed or known to be the exclusive property of any particular person, though, from the testimony, Ortman was the first to commence its excavation. Ortman and all others have long since abandoned the use of the first ditch.

In January, 1852, the defendants took up the waters of the creek for milling purposes, and erected a saw mill, which they have owned ever since, and used the same from time to time. In 1853, Louis Duhamel, with two others, commenced the construction of a second ditch, marked Ditch No. 2 on the map, at a point above defendant's mill-pond, and higher up the stream, by means of which they diverted water of the creek to the same mining claims as the first ditch did. Duhamel & Co. used the water which their ditch afforded at such times as the defendants were not engaged in running their mill, but desisted whenever the defendants had use for the water. The evidence shows that Duhamel & Co. recognized and acquiesced in the prior rights of defendants to the water of this creek. Some time in the year 1853, Duhamel & Co. sold the ditch to the plaintiffs, by which they acquired all the rights and privileges possessed by Duhamel & Co., and have since that time used the water for mining. The defendants, in the fall of 1856, constructed a third ditch, still higher up the stream, and above the last mentioned Ditch, No. 2 of the plaintiff, through which they diverted all the water ordinarily flowing in the creek, and conveyed it to near the same mining claims as the other two ditches, which water they disposed of to the miners.

We presume that it is not to be doubted that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant.

But another and different question arises, and that is, to what extent does this power or right go? The measure of the right, as to extent, follows the nature of the appropriation, or the uses for which it is taken. The intent to take and appropriate, and the out-

ward act, go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises, what did he choose to take? And this depends upon the general and particular uses he makes of it. If, for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water, would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it. So, if A erects a mill on a running stream, this shows an appropriation of the water for the mill; but, if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. The truth is, he only appropriates so much as he needs for the given purpose. It may be true, as the counsel has ingeniously argued, that he may change the use, and even the place of using; but this concession does not help the argument, for the question is not how he may use his own, but what is his own?

The principle is not materially different when applied to the fact that the ditch of defendant was built above plaintiff's mill, and the water diverted so as to be carried out of the old channel or course; for, upon the ground suggested, plaintiff was only entitled to the water for the purposes of the mill. He was entitled to all, whenever all was necessary for the mill; but whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes. It is not a question of priority, as to two classes of appropriators; for we can not draw any distinction between the mill owner and the miner. But it is a question between claimants of the same article—each claiming a part. There is no real conflict of title—the latter only claiming what is left by the former, and what the former has not taken. The mistake of the argument of appellant's counsel is, in assuming that the mill owner had appropriated all of this water, and, therefore, could use all for any other purpose. But the finding is, and we assume the proof, too, that he only appropriated so much as was needed for running his mill. It is as if the paramount proprietor had made him a grant of so much water as was so needed. When the respondent's predecessor located his ditch, this was the beginning of his right. The appellant could not impair this right.

It might be argued with great force that the mill owner was not entitled by erecting his mill and dam to the water in specie, and as a commodity to be taken out and sold; that he is only entitled to its use as a motive power; that it would lead to injurious consequences to hold that a man erecting a mill and dam on a large stream of running water, could use it as long as he chose and then divert it from ditches below; that the right to water comes from the appropriation, and that appropriation is taking with the intent to apply

to the uses of the person taking; and there may be as well an appropriation of a limited quantity, or for a limited purpose—an appropriation of a mere use as an appropriation of the water as property for sale. But it is not necessary to go to this length for any purpose of this decision. It is enough to hold that this appropriation, according to the finding of facts, was not an appropriation of all this water as the property of the appellant; but only an appropriation of so much as necessary for the mill; and that the appellant, after the claim to this residuum had attached by the plaintiff's appropriation, could not enlarge his right at the expense of the respondent's rights already vested.

We take the facts as they are found by the court below. It is admitted by the counsel that the proofs are conflicting; and we do not usually interfere in such instances.

Judgment affirmed.

Field, J., having been counsel in the court below, did not sit in the case.

DAVIS ET AL. *v.* GALE

1867. SUPREME COURT OF CALIFORNIA

32 Cal. 26, 91 Am. Dec. 554

By the court, Sanderson, J.:

Action to restrain the defendant from diverting the waters of Mormon creek, in Tuolumne county, to the prejudice of the plaintiffs' prior rights, and for damages already sustained. The case was tried with a jury in the court below, and a general verdict in favor of the plaintiffs was rendered. Under the direction of the court, the jury also rendered a special verdict, in view of which it was claimed by the defendant that the judgment should go with him. The court held otherwise, and rendered a judgment for the plaintiffs for the amount of damages found by the jury, and perpetually restraining the defendant from interfering with or diverting the waters of the creek at any time in such a manner as to interrupt or disturb the use of the plaintiffs to the extent of their interest therein, which was fixed at sixty-two inches. A motion for a new trial was made and denied.

The complaint is in the usual form in such cases. An appropriation and continuous use of the waters of Mormon creek, running as far back as the spring of 1851, for mining and agricultural purposes, by means of a ditch dug for that purpose, is alleged; and also a subsequent diversion of the water to the prejudice of the plaintiffs by defendant, by means of a ditch which taps the creek at a point above that of the plaintiffs.

The defendant denies the prior right of the plaintiffs, and sets up a prior right in himself, and avers an appropriation and continuous use of the waters of the creek to the capacity of his ditch, which is four hundred inches, for mining and agricultural purposes, from a date prior to the appropriation of the plaintiffs.

The defendant further alleges that the plaintiffs' ditch was dug out and the waters of the creek appropriated by them or their grantors solely for the purpose of working a few mining claims which belonged to the first owners of the ditch; and that said claims were worked out, and, together with the ditch, abandoned by the then owners long prior to the time at which the plaintiffs became the owners or possessors of the ditch.

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No exceptions were taken to the admissibility of evidence, and all the questions made by counsel relate to the law of the case, as applicable to the facts specially found by the jury, and as construed by the court in refusing and giving instructions.

The plaintiff's ditch was dug in March or April, 1851, and sixty-two inches of the waters of the creek thereby appropriated. The ditch was dug and said appropriation made solely for the purpose of working certain mining claims which belonged to the parties by whom the ditch was dug; and said purpose was fully accomplished prior to the fifth of July, 1855, which was the date at which the ditch was sold to Reynolds, Goodwin & Co., by whom the ditch was extended and afterwards sold to Battenfield in May, 1858, who afterwards sold to plaintiffs on the tenth of February, 1864. More than two years intervened between the date at which the mining claims were worked out and abandoned and the first sale of the ditch; during which time the owners made no use of the ditch, but went to other parts, leaving the ditch, however, in the care of one Demple, with license to use the same. The plaintiffs now use and seek to use the waters of the creek for mining and other purposes at other localities than those for which their ditch was originally constructed, which was also true of Reynolds, Goodwin & Co., and Battenfield, while they respectively owned the ditch.

The defendant's ditch was dug in August or September, 1851, and prior to any change in the use of the water by plaintiffs' first grantors.

The foregoing are all the facts that are useful in illustrating the points made upon the evidence. The other facts bear more especially upon the question of the Statute of Limitations, and will be noticed hereafter.

The fact that the plaintiffs' ditch was dug and their appropriation first made solely for working certain mining claims, long since worked out and abandoned, gives rise to the principal question. In view of that fact it is claimed that the plaintiffs' first grantors lost their right to the use of the waters of the creek the moment the purpose for which they first appropriated them had become accom-

plished, and that neither they nor their grantors could thereafter rightfully claim the use of the water, on the score of their original appropriation, for the purpose of working other claims, and that hence, conceding the original appropriation of the plaintiffs to have been prior to that of the defendant, the relative rights of the parties became changed when the original object of the plaintiffs had been accomplished, and thereafter the defendant became first in right and the plaintiffs second.

How far a party's right to the use of water is limited by the object for which it was first appropriated arose in the case of Maeris *v.* Bicknell, 7 Cal. 261. Mr. Justice Burnett, by whom the opinion of the court was delivered, said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change. This question we think can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another without affecting his prior right, we express no opinion, as the point does not arise in this case."

Some doubt as to the soundness of this view seems to have been afterwards entertained, but for what reason we are at a loss to perceive. In McKinney *v.* Smith, 21 Cal. 383, Mr. Justice Norton said: "We are aware that in the case of Maeris *v.* Bicknell it was decided that a party who makes an appropriation of water can change the place of its use, as by an extension of the ditch, without losing his priority as against those whose rights have attached before the change, but the court expressly reserved the expression of any opinion whether a party could change the use of the water from one purpose to another without losing his priority. * * * There may be difficulty, in many cases, in determining that the appropriation was limited to a special purpose or to a particular locality. Each case must be decided upon its peculiar facts. * * * On the facts as they existed when the defendants began their works they had the right to appropriate the water to any use that would not interfere with the plaintiffs' use of it for the special purpose to which they had appropriated it."

Suppose a party taps a stream of water for the purpose of surface mining in a given locality, and afterwards finds that the ground will not pay or that ground farther on will pay better, may he not abandon the former and extend his ditch to the latter without losing his priority? Or suppose, after working off the surface, he finds quartz, may he not erect a mill and convert the water into a motive power without forfeiting his prior right? Suppose he appropriates

the water for the purpose of running a saw mill, and, after the timber is exhausted, he finds that a grist mill will pay—may he not convert the former into the latter without surrendering his priority to some one who may have subsequently and in the meantime tapped the same stream?

We think all this may be done, and are unable to suggest a plausible reason why it may not. In cases like the present a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges. The water rights involved in this case may not be of great value, and their acquisition may not have been attended with much expense, but there are many similar privileges which have been secured only by the use of large sums of money, and to hold that they are limited to the particular place or to the particular purpose in view of which they were first sought would, for obvious reasons, lead to most pernicious results and greatly delay and embarrass the development of the resources of the country.

The only question which can legitimately arise in connection with the facts under consideration is abandonment. The fact that the water was appropriated solely for a special and particular purpose, and the further fact that that purpose had been fully accomplished, and the further fact that the parties concerned in it had dispersed to other parts, and that more than two years were allowed to pass without their giving any attention to the ditch, and then only to make a sale of it to others at the nominal sum of twenty-five dollars, all bear directly on that question. In view of those facts, a jury might find abandonment, and in that event the subsequent sale to Reynolds, Goodwin & Co., whether in good faith or not, would not have revived the right which was secured by the first appropriation.

There was testimony tending to show that the defendant had been in the adverse possession of the water of Mormon creek, as against the plaintiffs and their grantors, to the capacity of his ditch, for more than five years prior to the commencement of the action, and the instruction asked by the defendant bearing upon the Statute of Limitations ought to have been given. Although the plaintiffs may have had the prior right, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute.

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The order denying a new trial is reversed and a new trial is granted.

MEAGHER *v.* HARDENBROOK ET AL.

1891. SUPREME COURT OF MONTANA

11 *Mont.* 385, 28 *Pac.* 451

HARWOOD, J.: Action to determine the several rights of plaintiff and forty persons, named as defendants, in and to the waters of "Race-Track creek," a natural stream of water situate in Deer Lodge county, tributary to Deer Lodge river. The action was tried by the court sitting without a jury, and by findings made in writing, and judgment accordingly, the court found and determined the respective rights of all the parties to the action in and to the waters of said creek, and also the relation of such water-rights to one another as to priority. All parties having set up their respective claims to certain portions of the water of said creek by pleading, a stipulation was made by them through their counsel to the effect that at the trial each party, whether plaintiff or defendant, should be deemed to have denied all allegations of the pleadings of every other party to the action claiming right to any of the waters of said creek, and that each party might introduce evidence "to show non-appropriation, non-user, or abandonment by the plaintiff or any of the defendants."

The questions brought here for review by this appeal arose between certain defendants. The court found and adjudged that defendants C. K. Hardenbrook and R. S. Kelley were entitled to 400 inches of the waters of said creek, by reason of an appropriation thereof made in the year 1869, which finding and judgment made the water-right of defendants Hardenbrook and Kelley the fourth in the order of appropriations. From this portion of the judgment, certain other defendants, whose rights were adjudged to be subsequent to that of Hardenbrook and Kelley, have appealed. The findings of fact by the court in relation to the water-rights of defendants Hardenbrook and Kelley, upon which the court pronounced judgment in their favor, are as follows: "Findings for the defendants R. S. Kelley and C. K. Hardenbrook. The court finds as facts that the Miners' ditch was commenced to be surveyed in the latter part of the year 1869; that it was built and owned by the owners of certain placer mines, situated in two or three different gulches, from ten to twelve miles from the head of the ditch; that water was turned into the ditch as far as Prairie and Spring gulches in the summer of 1871 and into Antelope gulch a year later; that the ownership of the ditch was divided into twenty-four parts, each part being represented by a share; that at the time of the commencement of this action the defendant R. S. Kelley was the owner of three shares, and the defendant C. K. Hardenbrook was the owner of eight shares; that none of the waters of the Miners' ditch have been used

on placer mining ground since the year 1886; that the Miners' ditch has been abandoned since the year 1886; that waters claimed as belonging to the Miners' ditch were turned into Race-Track creek in the year 1886, and were recaptured by the defendant C. K. Hardenbrook and used for the purpose of irrigating land belonging to him, to the extent of 400 inches; that the remaining amount of water belonging to the Miners' ditch has been abandoned by the owners thereof from and after the year 1886; that the ditches owned or used by the defendant C. K. Hardenbrook are of sufficient capacity to carry said amount of 400 inches." The point of contention on the part of appellants is that upon said facts found it was error to adjudge that the appropriation of 400 inches of water from said creek, in favor of defendants Hardenbrook and Kelley, dated from appropriation thereof through said Miners' ditch for mining purposes at the time set forth in the findings. They maintain that the owners of the Miners' ditch were tenants in common of the water-right acquired by the appropriation and use of the water taken thereby, and that when the use of said waters through said ditch for mining purposes ceased, and said ditch was abandoned in 1886, that was an abandonment of the water-right which had been gained and held by said tenants in common. On behalf of respondents it is admitted that the appropriators of the water of said creek used for mining purposes through said Miners' ditch were tenants in common of the water-right acquired thereby, and upon that relation, of such owners, it is maintained that any of the tenants in common could keep alive said water-right, or any part of it, by continued lawful use thereof; and that such use, as well as the place of use, could be changed from one purpose or place to another, subject only to complaint of other tenants in common, whose rights are infringed thereby; and that no such complaint is under consideration in this case. The several parties who owned the Miners' ditch, and acquired the water-right by appropriation and use of the waters of said creek, through said ditch, were undoubtedly tenants in common of such water-right. Bradley *v.* Harkness, 26 Cal. 69; McConnell *v.* Denver, 35 Cal. 369; Reed *v.* Spicer, 27 Cal. 58; Freem. Co-Ten., sec. 88.

But the use of the water for mining purposes through said Miners' ditch ceased in 1886, and that ditch has been abandoned since that year; and, as said in the finding, the "waters claimed as belonging to the Miners' ditch were turned into Race-Track creek in the year 1886, and were recaptured by defendant Hardenbrook, and used for the purpose of irrigating land belonging to him, to the extent of 400 inches." Was this a lawful exercise of the rights of a tenant in common of said water as against all, except other tenants in common, who may not have consented to such change of use? We think this proposition must be answered in the affirmative, and such holding affirms the judgment of the court below. We can not draw from the finding of the court the conclusion which

appellants' counsel contends for, namely, that the abandonment of the Miners' ditch was also an abandonment of the entire water-right acquired by the appropriation of water through said ditch. Abandonment is a matter of fact to be found by considering the act and intention of the party alleged to have abandoned a thing. 1 Amer. & Eng. Ency. of Law 1, and cases cited. By referring to the findings of the court it will be seen that it was found, not only that the waters belonging to the Miners' ditch were turned back into Race-Track creek, and were recaptured by Hardenbrook to the extent of 400 inches, but that "the remaining amount of water belonging to the Miners' ditch has been abandoned by the owners thereof from the year 1886." Now, this clearly shows that the court found, not that the whole of the water used through the Miners' ditch was abandoned, but that all in excess of 400 inches was abandoned. That one tenant in common may preserve the entire estate or right held in common is a proposition so well settled it is unnecessary to cite authorities in support thereof. In this the tenant in common is only preserving his own, as his right partakes of the whole. It would seem to follow from analogy that one tenant in common may, of course, preserve part of the common estate or right. In the peculiar case of water-rights it would appear to be so with more force, because the right can only be preserved by both the use, and the necessity for the use, for some beneficial purpose; so that a tenant in common, in preserving this right, can only preserve it to such extent as he can use it. As regards the change in the use of the water-right from one lawful and beneficial purpose to another, we think the holding in the case of Woolman *v.* Garringer, 1 Mont. 535, to the effect that such change is lawful, covers this point of contention in the case at bar. The same rule prevails in California: Kidd *v.* Laird, 15 Cal. 163; Davis *v.* Gale, 32 Cal. 27; Higgins *v.* Barker, 42 Cal. 233; Junkans *v.* Bergin, 67 Cal. 267. It is ordered that the judgment be affirmed.

Blake, C. J., and De Witt, J., concur.

LAST CHANCE MINING CO. *v.* BUNKER HILL AND S. MINING AND CONCENTRATING CO.

1892. CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF IDAHO

49 Fed. 430

BEATTY, District Judge: This cause is submitted upon an agreed statement of facts, from which it appears that the defendant, during the months of February, April and May, 1886, located three water-rights on Milo creek, in Shoshone county, Idaho, the water of which

was conducted by separate ditches to defendant's ore milling plant, known as the "Old Concentrator"; that after being there used for the purpose of concentrating the ore from defendant's mine, and running the machinery connected with the mine and works, it was turned back into the natural channel of said creek; that it thereafter continued to flow therein unclaimed, until in the month of June, 1889, the plaintiff, at a point of said creek some distance below where defendant so returned it, located 2,000 inches thereof, and thereafter continued to use it for milling purposes in concentrating the ore from its mines, until July, 1891, when the defendant, at a point on one of its ditches above its mill, so constructed a flume as to carry all the water of said creek, during the season of low water, around and beyond the place of appropriation and diversion by plaintiff, and thereby prevented plaintiff from any use thereof; and that all such premises and water-rights are situated upon the public lands of the United States. Under such circumstances, can the defendant, as the prior appropriator, now so change the place of use of such water as to deprive the plaintiff thereof? is the question for determination.

With the first development of the Pacific coast by the American pioneer, water became an indispensable factor in mining, agricultural and other material interests, and with its early use began the formulation of rules for its regulation. Those rules were by the courts and legislatures first followed, then adopted as laws, and subsequently were ratified by congress by act of 1866. Among the first of such rules, which has ripened into law, was that favoring the prior actual appropriation made for some useful purpose. The use, however, was to be a reasonable one, and, as far as possible, be consistent with a use by others. Prior possession did not imply authority to take what was not needed, or, by prodigality, waste what others might profitably utilize. That such equitable rule might be enforced, it became necessary that some notice, or acts equivalent to notice, should be made of the claim. To this in time were added the positive requirements of a written notice, with full details of the amount, nature, and place of diversion and use. These general principles were, prior to the inception of the rights involved in this action, incorporated into the laws of this state, which, in pursuance of those of congress, must govern all water-rights located upon the public lands and streams of the general government. By section 3160, Rev. Stat. Idaho, it is provided that the appropriator of water must post "a notice in writing * * * [stating therein" the amount claimed, "the purpose for which he claims it, and the place of intended use."] This requirement is designed less for his protection than as a notification to others of what is left unclaimed which they may appropriate. It would follow that when an appropriation is made with full knowledge of prior rights, and in entire subordination thereto, it is as much entitled to protection against the aggressions of a prior claimant as the latter would be against subsequent

intrusions. Also it is provided, by section 3156 of said statute, that "the appropriation must be for some useful or beneficial purpose, and when the appropriator ceases to use it for such purpose the right ceases." These sections together would seem to lead to the conclusion that, when an appropriator ceased to use the water at the place and for the purpose by him designated, he would be precluded from using it elsewhere or otherwise, and his rights concerning it would terminate. I think, however, a more liberal construction is justified, and, to render these rights of any permanent or material value, is demanded. The use for which the water is appropriated and to which it is applied is an important factor in the construction of the statute. The controlling question, in any case, is whether subsequent locators have had such notice of prior rights, and their extent and effect, as would guard them against making invalid locations.

In illustration, suppose some certain amount of water is appropriated to be used as a power by its conversion into steam; or, by combination with other elements, is to be converted into articles of merchandise; or to be used upon some certain tract of land for the purpose of irrigation. Should the appropriator be precluded from thereafter changing either or both,—its use, or the place thereof? The reply must be in the negative, for in all such cases the purpose of the appropriation is such that no subsequent appropriator can thereby be misled to his injury. Distinct notice is given in such cases, not only that so much water is drawn from the public supply, but that its appropriation is such that it can not be used a second time. It is a notice that so much water is practically destroyed,—is eliminated from existence as water. A subsequent locator has actual notice that this amount of water is withdrawn from all public claim, is absorbed, and has become a vested right. He can not base any claim upon it, or upon any expectation that, some time in the future, it will become the subject of appropriation. Should such prior right be subsequently forfeited, he gains nothing thereby, as his rights are measured alone by what he could, and actually did, claim at the time of his appropriation. Neither does he lose anything, nor is he in any way damaged, should the first appropriator change his use, or the place thereof, for, in either event, he still has left all he ever claimed, or was entitled to claim. The appropriation of water for placer mining purposes, at some specified place, involves a somewhat similar principle. It is such an actual appropriation of a definite amount, and for such purpose, as, in the nature of things, must operate as a notice to all that its place of use must, from time to time, as the ground is worked, be changed. Should one use the water after it passes from the works of the prior claimant, he must do so at his own risk, and he can not complain that changes are made which he had full notice would likely occur. In this action, however, the facts are quite different. In 1886 the defendant located the water, specifying that it was to be used at its

mill for the purpose of power in operating machinery and in concentrating ores, and in pursuance of such notice conducted it to such mill, and, after there so using, returned it to the original channel of the stream from which it had been taken, and practically undiminished in quantity or deteriorated or changed in quality. The use made of it was purely usufructuary, and in no sense partaking of the nature of ownership in the water. The defendant, by its declarations and acts, in effect said to the world that the only use it had for the water was at the place and in the manner specified, and that, when so used, it had no further claim upon and abandoned it. Under such circumstances, there was neither direct nor implied notice that it would be used elsewhere or for other purposes by defendant. On the contrary, the public was justified in believing that defendant had made the only use thereof intended; that the same would continue; and that in the future it would be returned to the creek as it had been. Would it not follow, from such facts, that plaintiff, in claiming the water after its return to the creek, was fully justified? If justified in such claim, then protection thereof must follow. If the defendant's position is sustained by the law, it would follow that the prior appropriator would, in all cases, so absolutely control the water, to the extent of such appropriation, that no other person could thereafter attempt any permanent use of it, except at great risk of loss, even when such use would not damage the first appropriator. Suppose, in this case, the stream below defendant's mill were lined with ore-mills, all operated by the same water, as it passed from the wheels of one mill to the next below, and all by appropriations subsequent to defendant. Upon defendant's theory, all such mills may be closed, and utterly destroyed, whenever the latter concludes to modify its plans, and divert the water elsewhere. Such a rule, I am firmly convinced, is counter to the policy of the law. Instead of developing the country, it would block its progress. Instead of utilizing, as generally as possible, nature's elements for the public good, it would subject them to the arbitrary will of any individual who might first assume a claim to them. It would be an extension of the maxim, "first in time, first in right," far beyond the limits of equity or justice. In this case the facts are not limited simply to the appropriation of the water, its use and return to the stream by defendant, but such status continued for over three years before plaintiff located, and thereafter continued for over two years to use it, without objection by defendant, and before the latter attempted, through the means stated, to interfere therewith.

Even if defendant's original claim of the water, its use and return to the stream, without any notice or reservation, direct or implied, of any other use, did not constitute a release of further claims, it certainly should be held that the continuation of such status for

over five years must operate as an abandonment of any further or different claim than that exercised. In view of all the facts, the doctrine urged by the defendant can not be acceded to, unless it is sustained by most potent judicial authority.

* * * * * * *

When defendant's water locations were made, section 3 of the act approved February 10, 1881, 11 Sess. Laws Idaho, 267, was in force, as follows:

"The appropriator, or his or their successors in interest, may change the place of diversion, if the rights acquired by others are not thereby interfered with, and no injury to others therefrom result, and may also extend any ditch, canal, flume, pipe, or other conduit to points or places beyond such as may have been designated or first used, saving the rights which may have accrued prior to such extension."

The plaintiff claims that, as defendant's rights were acquired under this section, its rights now are so controlled, as against plaintiff, by the last clause, that no change of the place of use can be made. But long before plaintiff made its location this section was revised into section 3157, Rev. Stat. Idaho, as follows:

"The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to places beyond that where the first use was made."

Whatever rights this revised section confers would accrue to defendant, and the defendant now relies upon this section in support of its right to make the change complained of. This position is fortified by the fact that the clause in the old statute prohibiting such change is omitted in the new. While it is evident that the legislature was simply aiming to exactly follow and adopt section 1412, Civil Code Cal., I think that it designed, by the statutory change, to permit the prior appropriator to change the place of use, as against a subsequent appropriator; but that it intended this to be done in all cases, regardless of the facts, is quite a different proposition. I still think it was designed that this extended liberty should include those cases, as above stated, in which the use of the water amounted to its absorption, or it was such as to imply notice to all that such change could be reasonably expected, and to exclude cases like the present, where it is appropriated and used for a specific purpose, and then abandoned. That the waters of the country may be monopolized by the few first comers, when they may be made to serve the many, would be an imputation of such improvident and inequitable legislation as should not be indulged, save upon overwhelming conviction. It must be concluded that plaintiff is entitled to protection for its water-right claim, its right thereto quieted, and defendant perpetually enjoined from interfering therewith, and it is now so ordered.

WASHINGTON STATE SUGAR CO. *v.* GOODRICH ET AL.

1915. SUPREME COURT OF IDAHO

(*Idaho*) 147 *Pac.* 1073

Action by the Washington State Sugar Company against Jacob Goodrich and others, to quiet title to certain water rights in Lewellyn creek. From a decree for defendants, plaintiff appeals.

* * * * * * *

BUDGE, J.: This is an action brought in the District Court of the Eighth Judicial District for the County of Kootenai, to quiet title to the waters of Lewellyn creek, a small stream rising in the mountains east of the lands now owned and in the possession of appellant and respondents, in this action.

Appellant owns a farm of 2,000 acres, situated about five miles from the point of diversion of appellant company's ditch on Lewellyn creek. When this action was commenced, a considerable portion of this land was in a high state of cultivation. It is arid in character, and requires irrigation for its successful cultivation. These lands were partially irrigated from a stream known as Sage creek, not in controversy in this action. Into this creek appellant undertook to convey the waters of Lewellyn creek by means of a ditch, the intake of which is located at or near what is known as Roush's sawmill.

On the 11th day of November, 1899, J. C. Roush, by written notice, appropriated and claimed 100 cubic feet of water per second of time of the waters of Lewellyn creek. On the 4th day of June, 1906, and on the 15th day of July, 1907, upon application duly made, the state engineer issued and subsequently approved permit No. 2158 to Edwin McBee, and permit No. 2978 to S. E. Beggs, for 25 and 9.6 cubic feet of water per second of time, respectively. On the 17th day of May, 1907, McBee assigned to Beggs all his right, title, and interest to the use of the waters of Lewellyn creek, under permit No. 2158, and Beggs, thereafter, on the 14th day of September, 1908, conveyed the same to the appellant herein, on which date he also transferred to appellant the right to the use of the waters of Lewellyn creek under permit No. 2978, records of which transfers were made in the office of the state engineer, on the 21st day of July, 1910. On the 23d day of September, 1908, J. C. Roush, by a written conveyance, transferred to appellant all right, title, and interest claimed under his appropriation to the water of Lewellyn creek.

During the month of October, 1908, and subsequent to the date of the purchase of the aforementioned rights to the use of the waters of Lewellyn creek, appellant commenced the construction of the Corbin ditch and flume, and prosecuted the work to completion during 1910, or 1911.

Lewellyn creek, from the intake of appellant's canal, runs in a westerly direction through the lands of the respondents, who claim the right to the use of the waters of said creek by reason of the construction of a ditch, known as the Hall-Goodrich ditch, in 1894, diverting the water of said stream to and upon their respective lands and also by the posting of water location notices and causing the same to be recorded in the county recorder's office of Kootenai county. This diversion and use, as well as the posting and filing of notices of appropriation of the waters of Lewellyn creek, respondents contend was prior to the right, if any, of the appellant and its predecessors.

* * * * * * *

On the 11th day of November, 1899, James C. Roush located and claimed a water right on Lewellyn creek of 100 cubic feet per second of time, to be used for running a saw-mill and for domestic and irrigation purposes, by filing and posting a notice, designated "Notice of water right location," and stating in said notice, among other things—

"reserving the right to convey said water or any part of it to any other place I may select. Said water is to be conveyed to place of use by ditches or flumes as may be considered most desirable and I hereby claim the right to enlarge said ditches or flumes or to repair the same whenever or wherever such may be necessary or to change location of same."

This appropriation was by Roush transferred by deed to the appellant corporation on the 23d day of September, 1907, under which location and transfer appellant contends that it is entitled to divert the waters therein attempted to be appropriated by Roush to its own use and to change the point of diversion, thereby applying the water of Lewellyn creek to the irrigation of its lands by the means set out in the Roush notice of appropriation. If appellant's contention has merit, at any time during fifteen years succeeding an appropriation of water for power and irrigation purposes, an appropriator may, if he reserves the right to do so, change the point of diversion and means of conducting of water to any other place for use, and a right initiated subsequent to said date of appropriation would be subject thereto; in other words, an appropriator, if appellant's contention were true, fifteen years after making an appropriation, would pe permitted (irrespective of rights that may intervene in the meantime) to change the use of the water, the manner of use, and the point of diversion without regard to the rights of others on the stream, based solely upon filing in the office of the county recorder a "Notice of water right location." With this contention we are not in accord.

The right to the use of the waters of Lewellyn creek for the purpose of operating Roush's mill was a vested right, so long as he used it for that purpose. The evidence shows that it required fifteen cubic feet per second of time to operate the Roush saw-mill. Roush,

however, attempted to appropriate 100 second feet, for the purpose of operating his mill and for irrigation, and this he undertook to sell and convey to appellant. The record shows that he irrigated less than one-half an acre of land, and had abandoned the irrigation of that one-half acre for some time prior to the commencement of this action.

Roush's appropriation of the water of Lewellyn creek for the operation of his saw-mill would not, by a conveyance to appellant, authorize the use of said water upon the lands of appellant located at a place above the point of diversion by respondents, and thus defeat the respondents' right to the use of said water for the purpose of irrigation. The fact that Roush appropriated a large quantity of water and reserved the right to himself to change the point of diversion and to use the waters for a dual purpose would not give him a prior right to the use of the water, except to the extent the water was actually put to a beneficial use within a reasonable time. The proof shows in this case that the quantity of water claimed by Roush and by him attempted to be transferred to appellant largely exceeded the quantity of water put to a beneficial use, either in the operation of his saw-mill or upon his land, and, therefore, exceeded the quantity actually appropriated. Senior *v.* Anderson, 115 Cal. 496. In Trimble *v.* Hellar, 23 Cal. App. 436, it is held that the test of an appropriator's right to water for irrigation is the amount of water actually used for a beneficial purpose. In the case of the California Pastoral and Agri. Co. *v.* Madera Canal and Irr. Co., 167 Cal. 78, 138 Pac. 718, the court said:

"The effect of the decisions clearly appears to be that one actually diverting water under a claim of appropriation for a useful or beneficial purpose can not, by such diversion, acquire any right to divert more water than is reasonably necessary for such use or purpose, no matter how long a diversion in excess thereof has continued. * * *"

It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. Kirk *v.* Bartholomew, 3 Idaho (Hasb.) 367. A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

We think it is therefore clear that Roush could not appropriate water for the operation of his saw-mill and, after appropriations were made by the respondents of the right to the use of the waters of the Lewellyn creek for irrigation purposes, transfer his appropriation to appellant and thus defeat the rights of the respondents to the use of the waters for the irrigation of their lands.

CREEK *v.* BOZEMAN WATERWORKS CO.

1894. SUPREME COURT OF MONTANA

15 *Mont.* 121, 38 *Pac.* 459

Action by Rachel E. Creek against Bozeman Waterworks Company to enjoin defendant from diverting all the waters of a creek. Judgment was rendered for defendant, and plaintiff appeals.

* * * * * * *

As a result of the trial and consideration of the case by the court, it found: "That the Bozeman Water-works Company is successor in interest to one L. B. Lyman;" that said Lyman, about the month of August, 1864, settled upon 160 acres of land, particularly described, lying adjacent to said creek, and that about that date he diverted, by means of ditches and dams, 246¼ inches of the water of said creek (which volume comprised all the waters of said creek, measured according to the rule prescribed by statute), and used the same "upon the land described, for the irrigation thereof, and for other useful and beneficial purposes, by the said L. B. Lyman;" that said land settled upon by said Lyman "constitutes part of the present farm owned by the Bozeman Water-works Company;" "that said farm, together with the right to use all waters of Lyman creek, have descended by regular conveyance from said Lyman, through his successors, to the Bozeman Water-works Company, which is now the owner of said farm and water rights;" "that since said year 1864, the water of Lyman creek has been used continuously upon the farm now owned by the Bozeman Water-works Company by the appropriator, L. B. Lyman, and his successors in interest;" "that the Bozeman Water-works Company, about the year 1889, constructed a reservoir on its ranch, for the purpose of receiving the waters of Lyman creek, and laid a main pipe line and laterals, for the purpose of supplying the citizens of Bozeman with water for domestic and other purposes"; that said company "and its predecessors in interest have at all times since the date of the appropriation in 1864 asserted claim to all of the waters of Lyman creek, and have used the same for irrigation, and for watering stock, and for other useful and beneficial purposes"; that "the lands owned by the Bozeman Water-works Company require artificial irrigation to make the same valuable and productive"; that "all the waters of Lyman creek are required and needed by the Bozeman Water-works Company for its own beneficial uses and purposes." The trial court further found that "plaintiff's husband, in 1884, settled upon the land now owned by the plaintiff, and in the summer of 1884 dug a ditch, tapping Lyman creek, of sufficient size and capacity to carry thirty-nine inches of water, measured according to the rule prescribed by the statute of Montana"; that "said water was used upon the land now

owned by the plaintiff, Rachel E. Creek; that there are some small springs arising in Lyman creek below the pipe line, and below the two upper ditches of the Bozeman Water-works Company, tapping said creek." Thereupon the trial court affirmed as conclusions of law that "the Bozeman Water-works Company is the owner of and entitled to the use of all of the waters of Lyman creek which rise and flow down said creek at any point above where the lower mining ditch, owned by the said Bozeman Water-works Company, now taps said creek"; that said company "is entitled to the waters of Lyman creek for the purpose of supplying the citizens of Bozeman with water, or for any other useful or beneficial purpose to which it may apply the same"; and "that plaintiff, Rachel E. Creek, or her predecessors in interest, appropriated, or could appropriate, in 1884, only such water as arose from springs in Lyman creek below the point where the lower mining ditch, which is now owned by the Bozeman Water-works Company, intersects or taps said creek."

HARWOOD, J. (after stating the facts): The main question of law involved in this case may be stated by the following proposition: Where several individuals in succession have, pursuant to the provisions of the laws of this state regarding water rights, appropriated and acquired right to use the waters of a creek for certain beneficial purposes, such as the irrigation of their respective farms, may the first appropriator, or his successor, after subsequent appropriations have been acquired, not only use the waters of the creek by him appropriated for his individual uses, but, in addition, after his individual use has been sufficed, convey the waters of such creek entirely away from its usual channel, and sell the same to the inhabitants of a city for their use, and thereby, without recompense, deprive the subsequent appropriators of the use of the waters of said creek, which they had enjoyed along with the first appropriator's former use of it? The answer to this question must be in the negative. The right acquired by an appropriator in and to the waters of a natural stream is not ownership of a running volume of the dimensions claimed, like the individual ownership of a chattel, so that it may be transferred corporally and carried away; but the right acquired by the appropriator is the right to use a certain quantity for necessary and beneficial purposes, such as supplying household needs, and the carrying on of some useful industry; and when such want is supplied, or the use is subserved, all the rest of the creek, and all that returns thereto after such use, is subject to appropriation and use by another for some beneficial purpose. The same volume of water may, therefore, in its flow down the creek, supply many persons, even though the first appropriator claims the whole volume, and can at times, or even constantly, use the same for some industrial purpose, because such use does not usually swallow it, but leaves it available to others. By such an appropriation the first appropriator does not acquire a preemption of the whole creek, so that he or his successor may, after enjoying the use of it for some beneficial purpose, convey the creek

away, and cut off subsequent appropriators. Therefore a subsequent right to use the same water, or so much of it as returns to the creek, and to use the waters of the creek when the first is not using the same, may be acquired. And therefore the trial court proceeded upon an erroneous view or theory of the law governing water rights, and the relation of various appropriations to one another, in holding that plaintiff, or her predecessor, could not acquire by appropriation any right to the use of the waters of said creek arising and flowing therein above defendant's ditches. It is well understood that a creek in these mountainous regions, flowing a volume of two hundred and fifty inches would suffice to irrigate more than one small farm. Not only so,—that there are considerable periods when a farmer does not irrigate his crops, while the water in an adjacent stream, which he is entitled to use so far as his needs demand, flows on forever, and is subject to the use of others. It appears that Lyman settled upon the creek in question in 1864, acquired one hundred and sixty acres of land, and appropriated the waters of said creek to irrigate the same, to which right this defendant company has succeeded. Following the settlement and appropriation by Lyman for the purpose mentioned, plaintiff's husband acquired agricultural land, situate upon the banks of said creek, and likewise appropriated the water of said creek to irrigate his land. When the second appropriator came and viewed the situation, even conceding that Lyman had appropriated all and could use all of the waters of said creek at times for the irrigation of his land, it was very plain, considering the laws of nature, and the purpose for which Lyman was using said water, that there was sufficient opportunity for plaintiff's husband to irrigate a farm, notwithstanding Lyman's appropriation. Under these circumstances plaintiff's husband acquired a right to the use of said waters subsequent and subject to that of Lyman. But it came to pass, in the course of time, that Lyman sold his land, with his water right appurtenant thereto, to defendant company, and the company appears to have acquired some lands in addition to that owned by Lyman. But, in addition to the irrigation of its land as successor to the rights of Lyman, the company, about 1889, engaged in the business of supplying the inhabitants of the city of Bozeman with water for their use, and to that end conducted the water of said creek into a reservoir, and conveyed it thence to said city. And defendant company claims the right to so use the water, based upon Lyman's appropriation, which was prior to that of plaintiff's husband. On the same theory the first appropriator of the waters of a creek might use the same sufficiently for his own purposes, and then, instead of letting it go to the next subsequent appropriator, and so on in succession, he might sell the water to some individual who could not acquire any right to it by appropriation, and such purchaser would thereby acquire the water over the subsequent appropriator. For instance, if a creek supplied sufficient to irrigate five farms, and the first or first and second appropriators had claimed enough to comprise the whole

volume of the creek, instead of allowing the water, after their use, to pass on to the three subsequent appropriators, they might sell it out entirely to a sixth party desiring to use such water; and whereas the farms of the third, fourth and fifth appropriators had hitherto been sufficiently irrigated after the first and second had used sufficient of the waters of the creek for their purposes, it turns out that the first and second could sell and convey the water, depriving the third, fourth and fifth entirely thereof. Under such a theory, the early appropriators, whose claims are sufficient to include the volume of a flowing stream, instead of holding a usufructuary relation to it, would hold corporeal ownership of it, with power to control and dispose of it very much like a chattel.

It has been held that an appropriator of water may change the use of his appropriation from one purpose to another. Meagher *v.* Hardenbrook, 11 Mont. 381, and cases cited. But it has never been held in this state (nor are we cited to like holding elsewhere) that, after an appropriator has used the water sufficiently to answer the purpose of his appropriation, he might take the waters of the stream remaining which he could not use for the purpose of his appropriation, and sell it to other parties, thereby depriving subsequent appropriators of their right to use the same. But that is what defendant has accomplished in this case. Defendant has not changed the use for which the water in question was first appropriated by Lyman from that of irrigating agricultural lands to mining, or operating a mill, or the like, leaving the water, after such use, to go on to subsequent appropriators in succession; but defendant company has assumed to take the water of said creek over and above that necessary to irrigate its lands, and sell the same to others, who had no claim by appropriation thereto, to wit, to the inhabitants of the city of Bozeman, thereby depriving the next subsequent appropriator entirely of the use of said water. This defendant can not lawfully do, without acquiring plaintiff's right therein.

* * * * * * *

For the foregoing reasons, the judgment should be reversed, and the cause remanded for new trial, and an order of this court will be entered accordingly.

Pemberton, C. J., and De Witt, J., concur.

FARMERS' AND MERCHANTS' IRRIGATION CO. *v.* GOTHENBURG WATER POWER AND IRRIGATION CO.

1905. SUPREME COURT OF NEBRASKA

73 Nebr. 223, 102 N. W. 487

LETTON, C.: This is an appeal from the district court of Dawson county, Nebr., from proceedings brought to determine the priority of appropriation of the Gothenburg Water Power and Irrigation Company to water from the Platte river. The Gothenburg Water Power and Irrigation Company applied to the board of irrigation for an adjudication of the priority of its claim to an appropriation of two hundred cubic feet of water per second from the Platte river, in Lincoln county; and the Farmers' and Merchants' Irrigation Company contested its right, taking the position that the Gothenburg company have no right to use any of the water for irrigation east of the village of Gothenburg, nor any right to use water once applied for power purposes for irrigation. A hearing was had before the secretary of the state board, and an appeal was taken to the board of irrigation, and from the decision of the board an appeal was taken to the district court of Dawson county.

It appears that in 1889 and 1890, under the former irrigation law, an irrigating canal was constructed from a point in Lincoln county to the vicinity of the village of Gothenburg, Dawson county, a distance of about ten miles, by the Gothenburg Canal Company, which was afterwards succeeded by the Gothenburg Water Power and Irrigation Company, hereinafter called the defendant. In the notice of appropriation it was set forth that the water was to be diverted for the purposes of irrigation and agriculture, for the manufacture of ice, and for the furnishing of power, and also for other useful and beneficial purposes, including therein the right of storage thereof in basins, lakes, or reservoirs; that the place or places of intended use thereof should be on and along the line of the canal hereinafter mentioned; that the means by which said water should be diverted shall be an open ditch or canal, commencing at the point aforesaid on the Platte river, and running and extending from there through Lincoln and Dawson counties, in the state of Nebraska, in a southeasterly direction, for a distance of about ten miles, to a point in or near the village of Gothenburg, in said county of Dawson. The canal company completed its ditch under this notice of appropriation, and turned the water into a lake or reservoir near Gothenburg. The water was used for irrigation along the line of the canal, and for power purposes at Gothenburg; the waste water escaping from the flume flowing towards the south, into the Platte river. On the 26th day of June, 1894, the Farmers' and Merchants' Irrigation Company, hereinafter named the plaintiff, made an appropriation of the waters

of the Platte; the point of diversion being south and east of the point where the waste water from the Gothenburg canal, after being used for power, escaped into the Platte river, and below that point on the river. After this appropriation was made by the plaintiff, the defendant extended its ditch and laterals east from the lake, with the capacity to irrigate 17,000 acres of land, and since said time has been using the water on this land in such a manner that none of it escapes into the Platte river above the point of diversion of the plaintiff's ditch; thereby depriving the plaintiff of the use of the waters which formerly flowed through the waste way into the river.

The contention of the plaintiff, in substance, is that since the notice of appropriation made by the Gothenburg Canal Company specified that the place or places of intended use thereof should be on and along the line of the proposed canal, and since the length of the canal and the place of its termination are specifically mentioned, therefore the defendant acquired no right to use the water beyond the specified terminus north of Gothenburg; that other persons examining the notice of appropriation had the right to govern themselves by the notice; and that no use of water outside or beyond the line of the canal therein specified is allowable to the defendant. On September 22, 1894, the Gothenburg Canal Company made an additional appropriation of 80,000 cubic inches of water, which appropriation was subsequent to that of the plaintiff. The plaintiff contends that the only right that the defendant now has to use water east of the Gothenburg lake is derived by virtue of this appropriation.

The defendant claims that under the law governing the use of water, as applied in the states and territories wherein the law of appropriation prevails, it has the right to change the use of the water it had actually appropriated, from power purposes to irrigation purposes, if it so desire; that the use of the water for irrigation is as beneficial as the use of it for power. It further claims that the question is settled in this state by reason of section 5, art. 1, ch. 93a, Comp. Stat. 1903, which provides: "The person, company or corporation entitled to the use may * * * extend the ditch, flume, or aqueduct by which the diversion is made to places beyond that where the first use was made." It will be observed that all the appropriations under which both parties claim were made before the irrigation law of 1895 took effect, and that, their rights having become vested before the enactment of the same, its provisions are only applicable in so far as it determines priorities and in so far as it provides for the administration of water rights.

It appears from the evidence that previous to 1894 the Gothenburg Canal Company had actually constructed its canal, and diverted from the river the full amount of two hundred cubic feet of water per second; that this water was conveyed to a lake lying north of the town of Gothenburg; that the company constructed penstocks at the lake, and conveyed the water to water wheels for the purpose of gen-

erating power for lighting and manufacturing purposes; and that from thence the waste water escaped to the Platte river above the point of diversion from plaintiff's canal. In 1894 a great demand arising for water for irrigation, in May of that year, before plaintiff's appropriation was made, the defendant constructed small ditches lying eastward and southeastward from the lake; and, after plaintiff's appropriation had been made, one of these ditches was enlarged and extended for nearly twenty miles. Although these ditches were extended so as to carry the water beyond the lake, still no greater amount of water was diverted from the Platte river than had originally been appropriated.

This question has often arisen in other localities, especially in relation to the use of water for mining purposes. It often occurs in placer mining that the deposits of gold at the point to which the water was first conveyed have become exhausted, and it becomes necessary for the owners of the ditches and flumes to change the place of use of the water to another point, where the gravel has not been worked. It would, indeed, be a harsh rule to hold that after appropriating water, and after conveying it, it may be, for many miles, and at a great expense, the appropriator should not be allowed to put it to a beneficial use at some other point than that to which it was first conveyed, if he can no longer make a useful application of it at the first location. It has been the uniform rule to allow appropriators of water, after it has been actually taken and applied to some beneficial purpose, to change the place or character of its use. Maeris *v.* Bicknell, 7 Cal. 262, 68 Am. Dec. 257; Davis *v.* Gale, 32 Cal. 26, 91 Am. Dec. 554; Woolman *v.* Garringer, 1 Mont. 535; Wimer *v.* Simmons, 27 Ore. 1, 50 Am. St. 685. The appropriation having actually been made by the defendant, it acquired the right to use the water thus actually appropriated, either for the purpose for which it was first taken, or for any other useful or beneficial purposes within the objects claimed in its notice of appropriation. There is no evidence that, by reason of the extension of the defendant's ditch, any greater amount of water than two hundred cubic feet per second is diverted; and as long as the defendant takes no more water by reason of the longer ditches than it had taken previously, and actually applies it all to a beneficial use, the plaintiff can not complain.

Aside from these considerations, the statute, we think, settles this question. In our opinion, the section quoted is merely declaratory of the law as it existed before its enactment. Unless the statute applies to this case, it is of no force, for a plainer case for its operation could hardly exist.

Under the law existing in 1894, the defendant had the right to extend its ditch and change the use of the water so as to use it all for irrigation purposes, instead of for power, if it so desired; and therefore the holding of the board of irrigation and the district court that it had a prior right to the use of the whole two hundred inches of water is correct. But since the irrigation law of 1895 has been

enacted, under its provisions, by which the water must be attached to the land, it is incumbent upon the defendant clearly to specify in its application the identical lands upon which the water has been applied. The section of the statute allowing an extension of the ditch or a change of the place of use must be construed together with the provisions of the 1895 law, and, while a prior appropriator may change the place of use of water which had already been appropriated, it can only do so under the permission and subject to the administrative control of the board of irrigation.

Since the decree of the district court does not definitely point out the lands to which the beneficial use of the water applies, we recommend that its decision as to prorities be approved, but that the cause be reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.

Per Curiam: For the reasons stated in the foregoing opinion, the decision of the district court as to priorities is approved, and the cause reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.

WOOLMAN ET AL. *v.* GARRINGER ET AL.

1872. SUPREME COURT OF MONTANA TERRITORY

1 *Mont.* 535

MURPHY, J.: This is an appeal from the judgment-roll, in an action for damages, for the diversion of water, and for an injunction, united in the same complaint, tried to a jury, and judgment for damages and a perpetual injunction.

The jury returned a general verdict for $250 damages, in favor of the plaintiff, and, also, findings on the special issues submitted.

Thereupon, both parties filed motions—the plaintiffs for judgment and decree, and the defendants to set aside the general verdict, and for judgment upon the special findings.

Both motions were heard together, and the defendants' overruled, and the plaintiffs sustained, and, accordingly, judgment based upon the general verdict for $250 damages rendered, and a decree, based upon the pleadings, general verdict and special findings, for perpetual injunction entered, in favor of the plaintiffs and against the defendants.

To this action of the court, as also to the ruling out of certain testimony, and the refusal and giving certain instruction to the jury, defendants, by counsel, excepted and appealed to this court.

* * * * * * *

The proceedings are neither in conformity to the established principles and rules governing in law or in equity, but seem to partake of the nature of both, and are irregular and illegal throughout.

And for these reasons, if there were no others, the case will have to be reversed.

And here the matter might rest were it not for the fact that another and very important question presents itself, which it is considered advisable to notice in this connection.

It relates to the effect on the right of the appropriator of water of a change in the place of use of the water appropriated.

From the record it appears that on the 4th of June, 1866, the defendants and their predecessors in interest, by means of a dam, ditch and a posted notice at the point of appropriation, and about four miles above the mouth of the creek, did appropriate one thousand inches of the water of McClelland creek, in Jefferson county, Montana territory, for mining purposes.

And it also appears, that afterward, in September of the same year, plaintiffs, by means of a dam and ditch, about a mile below the point of defendants' appropriation, did likewise appropriate two hundred inches of the water of said creek.

And it further appears that defendants, by means of their said ditch, from the 30th day of June to the 4th day of July, 1870, did divert the water of the creek aforesaid from the head of and away from the plaintiffs' ditch.

And of these facts there is no controversy, and upon the appropriations, as above stated, the parties base their respective claims.

The record also shows that "there was no proof introduced tending to show," "nor" that "it was claimed on the trial that either right of either party had been abandoned." And further, that "it was proved and conceded that the defendants' appropriation of the water was prior in point of time, to the plaintiffs', to the extent of one thousand inches; but the plaintiffs claimed that, as they, the defendants and grantors, had not carried the water away, or given notice of their intent to carry it away from the head of plaintiffs' ditch, until after plaintiffs' grantors' appropriation, that, therefore, they could not thereafter do so."

And this is the proposition upon which the plaintiffs rested their case, and which we propose to briefly consider for the purpose, if possible, of settling the law in that regard so far as this territory is concerned.

The case seems to have been tried and determined upon the theory that the water was not carried away from the point where the plaintiffs' ditch tapped the stream, or that there was no actual notice

brought home to plaintiffs of such intention to carry it away before their subsequent appropriation.

The facts are, water was not carried away till after the dam and ditch of plaintiffs were constructed, nor does it appear that any notice, other than that of the general appropriation for mining purposes, was even given, except it be such as the acts of the defendants themselves might have indicated to the mind of a reasonable person. And it is not claimed that they did not follow up the construction of their ditch with proper diligence.

We are constrained to believe that all this was not necessary, and that the defendants had the right, under the circumstances, to change the place of use and divert the water to any other point, to the extent of their appropriation.

In the case of Maeris *v.* Bicknell, 7 Cal. 261, the court said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority, as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that the mere change in the use of water from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the right of the party. It would destroy the utility of such works were any other rule adopted."

And in the case of Davis *v.* Gale, 32 Cal. 26, this rule is not only confirmed, but the court goes still further and lays down another equally wise and important rule, that a prior appropriator may even change the use for which he first appropriated the water without losing his right of priority, as against a party whose subsequent appropriation was made before the change took place.

In the language of the learned judge who delivered the opinion of the court in that case, "a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use and nonuse are the tests of his right, and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications and most materially impair the value of water rights and privileges.

"Thus, a party may appropriate water, in the first instance, for the purpose of placer mining; and when his ground is worked out, or he finds it will not pay, or that ground further on is better, he may leave the former and carry the water to the latter without losing his priority.

"Or he may find paying quartz, and change the use of his water from fluming or sluicing into a motive power for crushing his quartz, without forfeiting his prior right.

"And so he may in the first place tap a stream for the purpose of running a saw-mill, and after the timber is exhausted, or he finds that a grist or any other kind of a mill will be more profitable, he may change the use from one purpose to the other and to a different point, if necessary, without surrendering or impairing his right of priority.

"These water rights are frequently secured by and attended with the expenditure of large sums of money, and to limit them to the particular place or the special purpose in view of which they were first sought and acquired, by such a harsh and arbitrary rule of law, would be manifestly unjust and seriously deleterious in its results, and greatly embarrass and retard the development of the resources of the country."

We agree with the view expressed in the case of The Union Water Company *v.* Crary, 25 Cal. 509, that the right of the first appropriator may be lost in whole or in part by adverse possession, under the statute of limitations. But in this case no adverse possession is contended for nor is the statute of limitations pleaded or relied upon by the plaintiffs.

And from the record it appears that the defendants pursued the work on their ditch, which is some twenty-seven miles long and cost about $50,000, with such reasonable diligence as would undoubtedly make the appropriation date and relate back to the commencement of the same, even were abandonment claimed and insisted upon.

The notices posted on the stream, of the appropriation of so much water for general mining purposes, and the immediate entering upon the continued prosecution of the construction of the dam and ditch, and its extension or branches, were sufficient to put the plaintiffs on their guard and to apprise them of the prior appropriation of the defendants and of their superior rights in the premises. And from these facts they were bound to take and were charged with notice of the defendants' prior appropriation, and if they then proceeded it was at their own option and peril.

Nor were the defendants required to take notice of any subsequent appropriation by the plaintiffs, nor to give notice that they intended to reclaim the waste water from their mining operations, and that plaintiffs could not always use the same.

The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel after it had been used and answered the purposes of the first appropriators, without any intention of recapture, and thereby became publice juris and subject to appropriation by any one, which does not appear from the record; but clearly the contrary it shows, and was claimed on the trial and proof offered to that effect.

The case is reversed and remanded.

GASSERT *v.* NOYES ET AL.

1896. SUPREME COURT OF MONTANA

18 *Mont.* 216, 44 *Pac.* 959

This action was instituted by Harry Gassert, in his lifetime, to determine the right to the use of the waters of Brown's gulch and its tributaries, in Silver Bow county, between the parties to this suit. Since the appeal, Harry Gassert has died, and Sarah C. Gassert, administratrix of his estate, has been substituted as plaintiff. The plaintiff claims the prior right to the use of 300 inches of the waters of said stream and its tributaries.

* * * * * * *

The case was tried to a jury. The jury made a number of special findings of fact, that will be noticed, as far as necessary, in the opinion. A general verdict for the plaintiff was also found by the jury. On motion, the court set aside the findings of fact made by the jury, and the verdict, and made findings of its own, and, on its own findings, rendered judgment for the defendants. From the judgment and order refusing a new trial, plaintiff appeals.

* * * * * * *

PEMBERTON, C. J.: * * * The jury found that the plaintiff had a right prior to that of the defendants to the use of 250 inches of the water in controversy. The court set aside this finding, and found that the right of the defendants to the use of 300 inches of the water was prior to that of plaintiff. The court found that plaintiff's appropriation was made in 1875, and that the grantors of defendants made their appropriation in 1868. From 1868 to 1878 the defendants and their grantors had used the water appropriated by them in mining on placer ground in Oro Fino gulch. After the water had been thus used, it was permitted by the defendants and their grantors to return by way of Oro Fino gulch to Brown's gulch, at a point above the plaintiff's ditch, so that plaintiff could use it through his ditch in irrigating his lands. In 1878 the defendants extended their ditch from the point on Oro Fino gulch, where their water had been used for ten years, to a point near Rocker, on the other side of the ridge or hill between Silver Bow creek and Brown's gulch. It is conceded that by extending the ditch through the ridge or hill between Brown's gulch and Silver Bow creek, to the point near Rocker, and thereby conveying the water to that point, it became impossible for it to be returned to Brown's gulch, but that it escaped into Silver Bow creek after being used near Rocker. Thus it appears that by extending their ditch and changing the place of the use of the water from the point where it was used when plaintiff made his appro-

priation, and long prior and subsequent thereto, the defendants absolutely deprived the plaintiff of the right to use the water in controversy at all. The question then is, had the defendants the right to so change the place of the use of the water in controversy as to deprive the plaintiff entirely of the use thereof? Upon this point the court instructed the jury as follows: "The owner of the water right has the right to change the point of diversion, or the place or manner or use of the water, as he or they may see fit and proper, provided the rights of other appropriators are not interfered with by such change; and in this case you are instructed that if the defendants were the owners of the waters of the tributaries of Brown's gulch, and were using the same upon their placer grounds, that they might change the place of use, so that the water, instead of flowing into Brown's gulch, would flow into Silver Bow creek." The giving of this instruction is assigned as error.

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In Proctor *v.* Jennings, 6 Nev. 83, a similar case, the court says: "Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum. So the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has any one the right to do anything which will, in the natural or probable course of things, curtail or interfere with the prior-acquired rights of those either above or below him on the same stream. The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it as the rights of those before him are secure from interference by him." Ortman *v.* Dixon, 13 Cal. 34; Eddy *v.* Simpson, 3 Cal. 349. In Last Chance Min. Co. *v.* Bunker Hill & S. Mining and Concentrating Co., 49 Fed. 430, after collating and discussing the cases and authorities bearing upon the question here involved, the court holds that "the appropriator of water to be used at a specified place, for the purpose of operating machinery and other works, after so using and returning to its original channel, can not change the place of use to the damage of a subsequent appropriator lower down on the stream." In Creek *v.* Waterworks Co., 15 Mont. 121, this court held an appropriator of water could change the use of his appropriation. But in that case we also held that the first appropriator could not so change the use as to deprive subsequent appropriators of rights acquired by them.

The facts of the case at bar, we think, bring it squarely within the rule announced in the authorities quoted and cited above. It will not be disputed, we think, that a prior appropriator of water can not so change the use of the water as to deprive the subsequent appropriator of his rights. If the prior appropriator can not encroach upon the rights of the subsequent appropriator by changing the use, we think, for the same reasons, he can not do so by changing the place of the use. This view, we think, is in accordance with the authorities, as well as reason and justice. We think the instruction complained of is in direct conflict with the authorities and views herein expressed. We are, therefore, clearly of the opinion that the instruction is erroneous. The instruction is certainly in conflict with the spirit, reason and holding of Creek *v.* Water-works Co., supra. To hold that the prior appropriator of water has the unrestricted right to so change the use, or the place of use, of water appropriated by him, as to wholly deprive subsequent appropriators of their rights is to subject the important question of water rights and irrigation in this state to the baleful influence of monopoly, which appears to us dangerous to private rights, and inimical to public policy. The judgment and order appealed from are reversed, and the cause remanded for new trial.

Hunt, J., concurs. De Witt, J., not sitting.

HALL *v.* BLACKMAN

1912. SUPREME COURT OF IDAHO

22 Idaho 556, 126 *Pac.* 1047

AILSHIE, J.: This is an appeal from a decree perpetually enjoining the appellant "from changing the place of the beneficial use of the water appropriated by him as shown by the findings, so as to cover or to apply the same upon the lands known as the Armitage ranch, or to so use or divert the same that the surplus may not return again to Bennett creek after beneficial use thereof, at a point above the intake of plaintiff's ditches."

In an action brought by respondent herein against the appellant in 1899, a decree was entered, and subsequently affirmed by this court, Hall *v.* Blackman, 8 Idaho *272*, establishing the rights of the respective parties to the waters of Bennett creek in Elmore county, and decreeing the respective appropriations for certain tracts of land owned by these parties. Under that decree the appellant herein was awarded for certain lands therein described an appropriation of 238 inches dating from March 1, 1872, and 114 inches dating from March 1, 1886. The respondent herein was awarded by that

decree 150 inches dating from April 1, 1879; 140 inches from April 1, 1882; 100 inches from April 1, 1885; 20 inches from April 1, 1886; 10 inches from May 1, 1886, and 220 inches from April 30, 1893. These several appropriations were awarded and decreed for specified tracts of land. Some years after this decree was entered and affirmed, the appellant, Blackman, acquired title to a tract of adjoining land, known as the Armitage tract, and appears to have irrigated from time to time a small portion thereof (something like ten acres) from flood and waste waters, and during the last few years has been turning out a small quantity (from twenty to thirty inches) from his regular appropriation for use on this tract of land. It is not entirely clear whether he has used this from his 1872 or his 1886 appropriation.

The real trouble, however, seems to have arisen in this case more on account of the place of the use than the quantity of water applied, and that difficulty is due to this fact: By carrying any of this water on to the land known as the Armitage tract, the seepage and waste water is carried off so that it does not return to Bennett creek above the respondent's headgate, and so the respondent gets no benefit from any of the waste or seepage water from this tract of land, whereas he acquired the full benefit of all waste and seepage and percolating water from the appellant's appropriation when used upon the lands to which it was originally decreed. The respondent's headgate is below appellant's lands, and it appears that the water rises, evidently from seepage and percolation, in the bed of Bennett creek between respondent's headgate and appellant's headgate, and as a consequence the respondent has during all these years enjoyed the benefit of the seepage, percolation and waste from the use and application of appellant's appropriation.

The trial court found in substance the foregoing facts, and that it would be a great injury and damage to the respondent herein to allow the appellant to continue to divert and use any part of his appropriation upon the tract of land described as the Armitage tract, and accordingly perpetually enjoined him from so doing. The evidence in the record is sufficient to support and sustain this finding and conclusion made by the trial court.

We do not deem it necessary to consider in this opinion the main question urged by appellant, namely, that a water user who has an adjudicated water right of a certain number of inches for a given tract of land may transfer a part of that water to other and new lands, so long as he does not divert and use more than the maximum of his appropriation. In other words, the appellant contends that if the farmer who has an established water right finds that he is able, by improving his land and economical distribution and use of the water decreed to him, to successfully cultivate the tract of land to which the water has been decreed and still have a quantity of the water left, he may properly and lawfully apply that water to the reclaiming of new lands, and that no other appropriator or user

of water has a right to complain of such action. The respondent admits that the water user may transfer a water right from one tract of land to another, provided it does not injure another appropriator; but he contends that one having a decreed right to a specific tract of land can not irrigate that tract and then carry any additional quantity of water which he may have remaining onto new lands, but that such surplus water should be allowed to flow down the main stream for the use of other appropriators. We do not deem it necessary or expedient to consider this question in the present case, for the reasons above stated.

From the whole record, we think the judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Stewart, C. J., and Sullivan, J., concur.

MANNING ET AL. *v.* FIFE ET AL.

1898. SUPREME COURT OF UTAH

17 Utah 232, 54 Pac. 111

ZANE, C. J.: This is an appeal from a decree dismissing appellants' bill for an injunction, and awarding costs against them. The questions for decision arise upon the findings. The proof upon which they were made is not before us. Each of the respective parties to this suit irrigated land from some of the canals mentioned in the findings, and is represented by the irrigation or canal company that owns it. It appears from the findings that the defendant, the Riverdale Bench Canal Company, appropriated, in 1866, 18.67 second-feet of water (the second-foot being the standard unit of measurement for flowing water in this state [Sess. Laws 1897, p. 225]), and has been entitled to that much ever since; that the Hooper Irrigation Company, lower down the river, appropriated, in 1867, 115.01 second-feet; that the Wilson Irrigation Company, at a point still further down, in 1870, appropriated 90 second-feet; and the Davis County & Weber County Canal Company, at a point four miles above the point of diversion of the Riverdale Bench canal, also made an appropriation later than either of the others. It further appears that the irrigating season of these respective canals was from April 15th to October 15th of each year; that, in pursuance of an agreement between the Riverdale Bench Canal Company and the Davis & Weber Canal Company the former closed its headgate at the Weber river five days, commencing on August 1, 1897, and the latter company, on the same day, turned into its canal from the river 18.67 second-feet of water for the same length of

time; that all the land that had and could be irrigated from the Riverdale Bench canal (being 500 acres, much of it wet) was sufficiently irrigated when it shut the water out of its canal, and that the Riverdale Bench Canal Company, by giving the water to the last appropriator, did not to any extent injure the crops growing on the land irrigated by it; that during the same time the crops and trees growing on the lands irrigated from the plaintiffs' canals were greatly injured and damaged, because the water left in the river was less than they had appropriated, and not sufficient to irrigate the lands under their canals during the same five days. The Riverdale Bench Canal Company claims the right to close its gate at the river, and allow the Davis & Weber County Canal Company to divert from the river into its canal 18.67 second-feet of water, though there may not be enough left to furnish the plaintiffs the amount of water appropriated by them, and to sufficiently irrigate the lands under their canals; while the plaintiffs deny that claim, and insist that they are entitled to so much of the water appropriated by the Riverdale Bench Canal Company as it does not actually use, and is not necessary to irrigate the lands under its canal, and for the domestic use of their occupants. The appropriation was from April 15th to October 15th of each year, and we must assume that the amount of water necessary to irrigate the 500 acres of land under its canals varied during that time. The court in effect found that no part of 18.67 second-feet of water was necessary to irrigate the lands susceptible of being watered from the Riverdale Bench canal, or for their occupants during the five days it was used by the Davis and Weber County canal. The difference between the quantity of water the Riverdale Bench Canal Company appropriated, and the quantity actually used and necessary for the purposes of its appropriation, the plaintiffs insist, was surplus water, and was theirs to the full quantity of their appropriation if they or either of them needed it for the purposes of their appropriation; that the first appropriator had no right to deprive them of it under such circumstances, by wasting it, or giving it away, or turning it to a company or other person whose appropriation was subsequent to theirs, and for whom it was not appropriated by the first appropriator.

The question is presented: Does an appropriator of water from a natural source of supply, when there are subsequent appropriators, who need the water, and actually have less than the quantity they appropriated, have the right to divert it to uses other than those for which it was appropriated, by giving it away or wasting it? Section 2780, Comp. Laws Utah 1888, declares that "a right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the follow-

ing circumstances: (1) Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water-course, lake, or spring, or other natural source of supply. (2) Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years." The right to the use of water for any useful purpose is deemed to have vested as a primary right to the reasonable necessity for such use. The right only vests to the extent of the necessity. The nominal appropriation as to quantity may be sufficient to afford enough at times when the most water is needed, and to that limit the appropriator may draw when necessity requires; but, when less than the nominal or maximum quantity is needed, the difference must go to subsequent appropriators, to be taken by them in the order of their appropriation. The quantity must vary according to the necessity. To this varying quantity the appropriator's right is always vested. And, if he takes more into his canal than the purposes of his appropriation require, section 2785, Comp. Laws Utah 1888, requires him to convey the surplus again to the natural channel or source for the use of subsequent appropriators. Sess. Laws Utah 1897, p. 221, sec. 7, provides that "in all cases where, by virtue of prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream, and there shall at any time be a surplus of water so diverted over and above what is actually used by the prior appropriator, such person shall be required to turn and to cause to flow back into the stream, such surplus water, and upon failure to do so, within twenty-four hours after demand being made upon him in writing by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved thereby for the amount of damage sustained after such notice; to be recovered by civil action by any person having a right to the use of such surplus water." When the prior appropriator diverts the water of a stream so that there is not enough left for those having subsequent rights, this section requires him to return to the stream, for their use, the surplus over what he actually uses; and a refusal to do so, upon demand in writing by the person entitled to the surplus water, makes him liable in damages to such person.

The Riverdale Bench Canal Company had no right to give the water it did not use, during the five days mentioned in the findings, to the Davis and Weber Canal Company, and that company had no right to use it. It belonged to the plaintiffs, in the order of their appropriations. Undoubtedly, the unappropriated waters of natural streams or other natural sources of supply may be appropriated by means of canals, ditches, reservoirs, or dams, to be used or sold for any useful purpose, and the quantity appropriated and named may be made sufficiently high for the greatest need of the appropriator;

but so much as is not actually required and used at any time must go back to the common source or channel for subsequent appropriators, in the order of their rights. It appears from the findings that the Riverdale Bench Canal Company appropriated 18.67 second-feet of water to be taken from Weber river for the purpose of irrigating 500 acres of land under its canal; that the plaintiffs subsequently made appropriations from the same river, naming the quantities. These appropriations included all the appropriation of the prior appropriator it did not need, and did not actually use for the purpose of its appropriation, to the extent of their nominal limit, when they needed it. That being so, their subsequent appropriator, the Davis and Weber County Canal Company, could not acquire a right to use surplus water from their prior appropriator, by gift or otherwise, while they needed it for the purposes of their appropriation. The appropriator may change the purpose of his appropriation, but he can not increase the quantity to the injury of existing subsequent appropriators, and he will be subject to the same rule after the change as before. He can not give away or dispose of his surplus water to the injury of subsequent appropriators. Creek *v.* Water-works Co., 15 Mont. 121; Nichols *v.* McIntosh, 19 Colo. 22; Barnes *v.* Sabron, 10 Nev. 217; Kin. Irr. sec. 231; Hague *v.* Irrigation Co., 16 Utah 421.

We are of the opinion that the court erred in making its conclusions of law, and in entering a decree thereon denying a writ of injunction, and in dismissing plaintiffs' complaint. Some of the findings of fact appear to be inconsistent, but the evidence is not before us. We, therefore, direct the court below to set aside its decree, conclusions of law, and findings of fact, and to make such consistent findings of fact as the evidence authorizes, and to state its conclusions of law therefrom, and enter a decree thereon in accordance with the principles announced in this opinion. Decree reversed, with costs to appellant.

Bartch and Miner, JJ., concur.

CLAYPOOL ET AL. *v.* O'NEILL

1913. SUPREME COURT OF OREGON

65 *Ore.* 511, 133 *Pac.* 349

This is a proceeding brought into the circuit court by an appeal from the adjudication made by the Board of Control of the state of Oregon of the rights and priorities to the waters of Cottonwood creek, a tributary of Bully creek, in Malheur county, Ore., in which Francis O'Neill sets up the fact that his rights to the waters of said creek had been adjudicated against Corder, the predecessor in in-

terest of Claypool, in the S. ½ of the N. W. ¼, and the N. W. ¼ of the S. W. ¼, of section 9, and against Arthur Sevey, by the circuit court of the state of Oregon for Malheur county, on the 6th day of October, 1899. In its determination of the relative rights to the use of the waters of said creek the Board of Control appears to have ignored the decree of the circuit court; and the circuit court in this case reversed the determination of the Board of Control, adjudging Francis O'Neill's rights as decreed in the former suit, namely, to the use of 100 miner's inches of water. From the decree of the circuit court, Claypool and Sevey appeal to this court.

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EAKIN, J.: The important question for consideration is whether the decree in O'Neill *v.* Corder et al. is final and conclusive against Claypool and Sevey in this proceeding to the extent that O'Neill must be considered the owner of 100 miner's inches of water in the flow of the creek; defendant contending that the said decree gives Francis O'Neill absolute title to the 100 miner's inches of water regardless of his needs, while plaintiffs contest his right to more water than necessary for the irrigation of his land. The Board of Control evidently disregarded that decree in determining defendant's rights. It is provided in section 6595, L. O. L., that the Board of Control can not impair relative priorities to the use of water, among parties to any decree of the courts rendered in causes determined prior to the taking effect of the Water Code of 1909. The rule is that the decree of a court of general jurisdiction is unimpeachable in a collateral proceeding. Section 756, L. O. L. It is conclusive of every fact necessary to uphold it as to all matters actually determined, or that might have been determined, upon the issues made. White *v.* Ladd, 41 Ore. 324, 93 Am. St. 732. The suit of O'Neill *v.* Corder et al. was commenced for the purpose of establishing the rights of plaintiff, and to enjoin the defendants from interfering therewith. Defendants were served with summons and appeared by demurrer, which was overruled; and, the defendants having failed to answer, and Corder consenting in writing, a decree was rendered which is conclusive against the defendants therein of the matters decided.

However, the decree gives to O'Neill the continuous and exclusive use of 100 miner's inches of water without reference to his needs, and he contends that he owns the title to the water absolutely, diverting it also for use on the lands of his wife, to the evident detriment of the plaintiffs in this proceeding, as the right of the wife's land to the use of said water is not next in priority. The rule is that when a party has a prior right to a certain quantity of water for irrigation, he is entitled to it only to the extent needed for the use for which it is appropriated. Thereafter the next person in right and priority, to the extent of that right, is entitled to the water when not so required by the prior claimant. Gardner *v.* Wright, 49 Ore. 609.

In the case of Mann *v.* Parker, 48 Ore. 321, it is said that an appropriation does not confer such an absolute right to the body of the water diverted from a stream. The appropriator can not allow it to run to waste nor prevent others from using it when it is not necessary for the purposes of his appropriation. See, also, Mattis *v.* Hosmer, 37 Ore. 523; Hough *v.* Porter, 51 Ore. 318; Ison *v.* Sturgill, 57 Ore. 109; Little Walla Irr. Union et al. *v.* Finis Irr. Co. et al., 62 Ore. 348. And no doubt the court in this case intended to decree to O'Neill no greater right.

In Gardner *v.* Wright, supra, the opinion limits the defendant to the need, namely: "As between the parties, plaintiffs and defendant herein, at all times that the water is not required by one of them, it should be at the disposal of the other." And this is the intent in all cases. It was beyond the province of the court to decree the water to plaintiff for a greater period than actually needed. Otherwise the effect of the decree in O'Neill *v.* Corder et al. as to Sevey can not be questioned in this proceeding. Sevey had his day in court as to the amount of water needed for the irrigation of O'Neill's land, and can not be heard to complain now; but Claypool was not a party to that suit, and neither he nor his land is bound by the decree. If Corder had answered in that case and claimed a prior appropriation for that land, the decree would be final as to priorities between the O'Neill lands and the Corder lands, but the only issue tendered was as to O'Neill's right to water for his land, and was against Corder to enjoin him from interfering with O'Neill's use. It was adjudged that O'Neill was entitled to 100 miner's inches, and Corder and Sevey were enjoined from interfering with his use of the same. The decree was personal as against them, but there was no adjudication as to the rights of the land then occupied by Corder. See Davis *v.* Chamberlain, 51 Ore. 304.

This covers the only question raised by O'Neill's objections to the findings of the Board of Control, and necessitates a reversal of the decree of the circuit court by which it is adjudged that the decree in O'Neill *v.* Corder et al. is conclusive against Claypool, as successor in interest to Corder, in the land claimed by him for the exclusive and continuous prior right to 100 miner's inches of the waters of the creek; and the findings of the board as to their relative rights will be modified to the extent following: As against Arthur J. Sevey, Francis O'Neill is entitled to a prior right of 2.5 second-feet of the water when actually needed upon his lands, described as the S. ½ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼, of section 9, and when not so needed and used thereon shall, to the extent of their interests as determined by the Board of Control, be at the disposal of the other parties hereto in the order of their priorities.

The decree of the circuit court is reversed, and the adjudication of the Board of Control is modified. The interests of the parties

as herein determined shall be observed by the water master of the district. Neither party shall recover costs on this appeal.[26]

FORT LYON CANAL CO. *v.* CHEW ET AL.

1905. SUPREME COURT OF COLORADO

33 Colo. 392, 81 Pac. 37

The plaintiff in error and the defendants in error were respectively plaintiff and defendants below. In bringing the action, plaintiff's avowed object, in which defendants co-operated, and in the accomplishment of which the trial court concurred, was to obtain a construction of section 3 of an act of the Twelfth General Assembly in relation to irrigation, found at page 236, ch. 105, Sess. Laws 1899, which reads: "It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; provided, that the owner or owners making such loan or exchange, shall give notice in writing signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water." The plaintiff maintains that the section is an unconstitutional, and the defendants say that it is a valid, enactment. A brief summary of the complaint, which concisely sets forth the substantial facts which gave rise to the controversy between the parties, will be the best way to bring out clearly the important legal questions involved. The plaintiff is a domestic corporation, and the owner of a canal which is used for the purpose of diverting water from the Arkansas river, to be used and applied by water consumers who are the owners of water rights thereunder. The defendants in the action are the superintendent of Water Division No. 2, and the water commissioners of included Water Districts Nos. 14 and 17. The other defendants are domestic corporations, owners of ditches, taking water from the same stream and in the same water districts, which were built and are now used, as is plaintiff's canal, for irrigating agricultural lands. All of these corporations, both plaintiff and defendants, were parties to former proceedings under the general irrigation statutes, which resulted in decrees awarding to their respective ditches the priorities then established. Of the defendants, the Arkansas Valley Ditch and Reservoir Company and the Catlin Con-

[26] See Williams *v.* Altnow, 51 Ore. 275, 97 Pac. 539.

solidated Canal Company secured priorities senior to, and the Twin Lakes Land and Water Company and the Laguna Canal Company later than, that of plaintiff. The Arkansas Valley Company, having at the time here in question no present need for water to supply its consumers, loaned or pretended to loan to the Twin Lakes Company a certain quantity of water, and its priority therefor, to which the lender claims it was then entitled, and gave the prescribed statutory notice, and demanded that the water commissioner, in distributing water, should recognize this loan. A similar loan was made by the Catlin Company to the Laguna Canal Company, accompanied by a like demand. The water commissioner recognized the demands, and threatened to carry them into effect by diverting to the respective claimants under the loans the quantity of water which the notices specified. The plaintiff charges that there was then a shortage in the supply of water from the Arkansas river in the water districts affected, and, in consequence of such loans and diversions in accordance therewith, the plaintiff, whose immediate need of water was pressing, would be deprived thereof, although, under the decreed priorities, it was then entitled to use these diversions ahead of the two borrowing companies, which are, as to plaintiff, junior appropriators, when the same were not actually needed by the lending companies, whose priorities are earlier than plaintiff's. To protect its rights the plaintiff asked for and obtained a temporary writ of injunction restraining the threatened acts. To the complaint was filed a pleading, which, though as to some of its allegations it is in form an answer, in legal effect is nothing more than a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff moved for judgment upon the pleadings. The motion was denied, the preliminary injunction dissolved, and, the plaintiff electing to stand by its motion, judgment was entered dismissing the action.

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CAMPBELL, J. (after stating the facts): From the opinion of the trial court rendered upon the motion for judgment on the pleadings, which is brought up in the record, as well as from the briefs of counsel now on file, it would seem that all the parties, as well as the trial court, considered the case made as one necessarily requiring that section 3 be adjudged valid or void in its entirety, and that, if it was upheld as a valid act, the complaint was bad; if it was void, the complaint was good. The court was of opinion that this section does not confer upon water right owners any rights or privileges which they did not theretofore have. The court also thought that, since by our decision in Strickler *v.* City of Colorado Springs, 16 Colo. 61, 25 Am. St. 245, and other subsequent cases, the owner of what is commonly called a "water right" may change its point of diversion and place and nature of use, and sell it separately from the land in connection with which the right ripened, it logically follows that temporary exchanges or loans of water rights

may be made for a limited time. The ruling, therefore, was that the section was valid, and the action was dismissed.

The act in which the section is found is entitled "An act in relation to irrigation." Sections 1 and 2 provide a method of procedure for one who desires permanently to change the point of diversion of his right to use water from any of the streams of this state for the purpose of irrigation. In substance, they absolutely prohibit such change unless and until the court having jurisdiction of the subject-matter first makes an investigation, and determines that the vested rights of others will not thereby be injuriously affected. Section 3, not only because of the title, but from a fair construction of its own language, is restricted to exchanges and loans of water for irrigation purposes only. The parties who are concerned in the exchange—the lender and the borrower—must each and all be the owners of rights to the use of water for irrigation.

In the Strickler case, and the others following it, we have said that a priority to the use of water for irrigation is in itself a property right, and may be sold and transferred separately from the land in connection with which it ripened, and that a prior appropriator may change the point of diversion or place of use or the character of the use, without losing his priority, provided the rights of others are not thereby injuriously affected. The trial court, as well as counsel for defendants in error here, says that it is a necessary deduction from these decisions that the owner may for a limited time or temporarily exchange or make a loan of a water right. The argument is that such act constitutes merely a change in the point of diversion or place of use temporarily instead of permanently —for a limited instead of an indefinite period; that the right to sell absolutely includes the lesser right to lease or exchange, and the absolute right to do each and all is a necessary incident of ownership. In support of this conclusion we are cited to some of our own decisions which we proceed to consider.

In Irrigating Co. *v.* Reservoir Co., 25 Colo. 144, 150, 71 Am. St. 123, we said that one tenant in common might preserve the entire estate held in common, and, where a priority had been adjudicated in favor of a ditch which was owned by tenants in common, so long as no more than the decreed quantity was diverted from the common source of supply, and the same was not wasted, it made no difference to a junior appropriator whether or not the quantity thus diverted, and to which the ditch, as a carrier, was entitled, was used by the tenants in common in exact accordance with their respective holdings, but that, if one consumer did not need or use all that his right called for, he might lawfully sell or lease it, or permit his cotenant to use it, before any subsequent appropriation attached thereto. This language must be taken in connection with the facts of the case in which it was employed. There the only complaint made was that, by reason of the arrangement between the tenants in common, there was an enlarged use of the water in volume, and the only evi-

dence directed to that issue was that a larger acreage was being irrigated than formerly had been. The point was not mooted that a priority of a certain volume was being used for a longer time than its owners were entitled to use it, or that the owner, after using it for his own land, could pass over a junior appropriator, and grant a right to a further use to another appropriator, junior to the one passed over.

In King *v.* Ackroyd, 28 Colo. 488, 495, the change of place of use there under consideration was held to be legally made, since no rights of other appropriators were injuriously affected. The only claim there asserted in support of the charge that injury resulted was that a greater quantity was used after than before the change was effected; but, having determined that no greater quantity was used after the change, the objection thereto was overruled.

In New Cache la Poudre *v.* Water S. and S. Co., 29 Colo. 469, 474, in holding that the first two sections of this act applied to attempted changes of the point of diversion which were not fully completed at the time the act took effect, we observed that—except in a certain contingency, not material here—whether or not the place of diversion may be changed could not be determined in that proceeding by the manner of use, or the quantity of water employed, or the length of time which the same is to be enjoyed by plaintiff after changing from the headgate of one ditch to that of another. That case contains nothing which can fairly be invoked as authority for the proposition that exchanges and loans of water may be made without reference to the vested rights of other appropriators from the same natural stream. There is, however, an intimation there that a priority may be measured by time as well as volume.

These cases, as well as others in which the doctrine has been expressly announced, are authority for the proposition that a priority of right to the use of water for irrigation may be limited not only by quantity, but also by time. That is to say, when an appropriation of water from a natural stream of this state is made, it can only be made for the purpose of being applied to the irrigation of land, and it must be so applied without waste, and, when not needed for the purpose for which it was appropriated, should be turned back into the natural stream, to be utilized by other appropriators in accordance with their respective numerical priorities. So long as it is used in connection with a given tract of land, it can not be made to do duty to that particular tract, and, when no longer needed therefor, applied to some other particular tract of its owner, or by him exchanged or loaned to some third person, to the injury of the rights of other appropriators.

It is not now necessary definitely and finally to say that an owner of a right to use water for irrigation may not temporarily or for a limited time exchange it with or loan it to some other water right owner, to be used for irrigating land in the same or some other water district, under conditions and in circumstances where such

change of place of use or point of diversion does not injuriously affect the rights of other appropriators, or that such temporary exchange or loan may not be made when its owner has no present immediate use for it, though he does not wish to sell it. But when such exchange or loan is made, if it can be done at all, it must be with due regard to the rights of other appropriators taking water from the same source of supply. In all the decisions which recognize the legality of a sale, and the right to make a permanent change of the point of diversion, or change of place of application, or the nature of the use, particular attention is called to the fact that it is not an absolute, but a qualified, right, and can not be exercised if it injuriously affects the rights of others. Just what, in every case, such injury may consist of, or how it may be shown, it is not for us now to determine.

To a temporary exchange or loan, if permissible in any case, the same principle is applicable, and the right thereto is subject to the same qualification, that governs an absolute sale or a permanent transfer. If section 3 purports to create rights which did not theretofore exist, or if it is to be interpreted as permitting exchanges or loans of water without reference to the rights of other appropriators, it can not be upheld as a valid legislative enactment. Such interpretation, however, we do not put upon it. If it can be so construed as not to infringe the Constitution or impair vested rights, such meaning should be given it. The language of the section is that owners of ditches and water rights may exchange or loan the water to which each may be entitled. This limitation itself restricts such exchanges and loans to such as may be made without injury to the rights of others. It may savor of reasoning in a circle, but the water to which its owner is entitled is only that water whose use, in the legal sense, does not injure others; hence, if the use of water by an owner himself, or by his agent or lessee, works no injury to any one, nobody can complain. But if he uses water, by himself or others with his consent, either by diverting and applying a larger volume than his priority calls for, or by using his decreed volume for a longer time than his needs require—in other words, if he exceed his priority either in volume or time—this act would, in time of a shortage, injuriously affect the rights of other appropriators. Therefore he is not, in such circumstances, using water to which he is entitled; and, under the plain language of the section, loans or exchanges which result in such wrongs are not within its purview, and would be unlawful, even if a statute expressly authorized them.

In brief, it is our opinion that this section neither adds to nor takes from any rights which owners of ditches and water rights had before the act was passed. Theretofore they had, under the irrigation laws of this state and the uniform decisions of our court, the right to make a sale of water rights separate from the land in connection with which the right was initiated and became perfected, and to change the point of diversion, place and character of use,

provided always that in its exercise the rights of others are not injuriously affected. It would seem to follow from this that the lesser right temporarily to exchange or loan water should be attended with the same results, and be subjected to the same limitation, if, indeed, it exists in a given case.

Sections 1 and 2 of the act prohibit the change in point of diversion until the party desiring to make the same has obtained an adjudication of the court that it can lawfully be accomplished without impairing the vested rights of others; that is to say, the right can not be exercised at all until after a decree therefor has been obtained that vested rights are not impaired. Section 3 seems to recognize a temporary exchange or loan of water without first obtaining a decree. The right, however, in the latter case, if it exist at all, as we have already held, is just as much subject to the qualification that the vested rights of others are not to be impaired as in the case of an attempted permanent change of the point of diversion. And when it has been made, though it may be effected without first obtaining a decree therefor, it is incumbent upon the party asserting rights under the loan or exchange, when challenged by an action in court, affirmatively to show that it can be exercised without interfering with or impairing the rights of others.

New Cache la Poudre Co. *v.* Water S. and S. Co., supra, while differing in its facts, we believe to be, in principle, authority for our conclusion in this case.

Slosser *v.* Salt River Val. Canal Co., 7 Ariz. 376, is an interesting case decided by the Supreme Court of Arizona. Plaintiff cites it to the point that exchanges or loans of a water right are wholly unauthorized. It may be, and doubtless is, true that under the facts of that case the lease there attempted was, under the laws of that territory, unlawful, for the lessor was trying to make a given priority do double duty by applying it first to his own land, and then to that of his lessee, as against the rights of other appropriators. And we may also concede that, under the same state of facts, such lease could not be upheld under our laws. But as the writer of the opinion in that case well says, the peculiar statutes of Arizona relating to irrigation, which, like those of the territory of New Mexico, are based on the Spanish and Mexican laws, are so unlike those of Colorado and other states, which have grown out of the local customs of miners, that the decisions of one state are not necessarily controlling in the others. And it would be unwise and dangerous to try to graft upon either system all the doctrines which have been established in the other. And yet, in summing up the feature of that case analogous to the case at bar, the court there made a declaration which is applicable under our own laws, when it said: "But we desire to be understood simply as holding that, so long as a water right is attached to a particular piece of land, it can not be made to do duty to such land, and as well to other land not owned or possessed by such water right holder, at the will or option of the latter." As

at present advised, we do not say that loans or exchanges may or may not be made, but we do say that the right to make them must be clearly shown by the party asserting its existence.

Let us apply the foregoing principles to the case at bar. While the complaint may not be as specific as is desirable, yet, as against a general demurrer, it is sufficient to put the defendants upon proof that the plaintiff's rights have not been injured. For the allegations, in substance, are that two defendants whose priority rights are senior to plaintiff's have, at a time when they did not need the water, loaned the same to two other defendants, whose rights are junior to the plaintiff's, and that when the loan was made there was a shortage of water in the stream, and, had it not been for such loans, the plaintiff, in accordance with the priority decree, was entitled to and would have received this water before the two junior defendants were supplied. If, as a matter of fact, these loans were made under conditions and in circumstances which permit of exchanges and loans of water, it is only right and proper that the burden of establishing the same be put upon the parties thereto. That this is the rule that should prevail seems only fair and just.

An appropriation of right to use water for irrigation can not be perfected in this state until, among other things, there has been an actual diversion of water from a natural stream, and within a reasonable time an application of the same has been made to a beneficial use. The appropriation must be made in connection with some particular tract of land, and, though it be not essential to its continued existence that the application shall be forever confined to the identical land for which the diversion was made, yet, so long as the water is used in connection with that land, it can not be made to do duty thereto, and at the same time or in the same season be used for the irrigation of some other tract, as against the rights of other appropriators which have theretofore attached. Such being the law of this state, when such exchanges or loans are made, or attempted to be made, they ought not to be permitted, if at all, until the parties seeking their benefits have clearly established that the alleged qualified right has been exercised in such a way, and at such times, and in such circumstances that the vested rights of others are not injured. The general rule is that, when an appropriator has no present need of water for irrigating his lands, he must not divert it from the natural stream, but it is his duty to let it flow in the natural channel, to be enjoyed by other appropriators as their numerical priorities entitle them. If a senior appropriator who has not such need for his own land may disregard the usual rule, and pass over one or more appropriators who are junior to him, and confer upon other appropriators, who are junior to those ignored, his senior rights, it is his duty to show the facts that justify the departure.

The application of these principles to the present action makes the ruling of the court below erroneous, and the judgment, therefore, should be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion, and it is so ordered.

Reversed.

Gabbert, C. J., and Steele, J., concur.

JOHNSTON ET AL. *v.* LITTLE HORSE CREEK IRRIGATING CO.

1904. SUPREME COURT OF WYOMING

13 Wyo. 208, 79 Pac. 22, 70 L. R. A. 341, 110 Am. St. 986

POTTER, J.: This is a proceeding in error complaining of a final decree entered by the district court in and for Laramie county, perpetually enjoining the defendants below (plantiffs in error here) from any interference with the plaintiff below (defendant in error here) in the use and enjoyment of an undivided one-half interest in and to ten cubic feet of water per second of time of the waters flowing in Little Horse creek; the said ten cubic feet of water being the amount awarded to the Springvale Ditch Company by decree of the State Board of Control rendered May 7, 1891, as of priority No. 8 on said stream, and said undivided one-half interest having been conveyed October 30, 1894, by deed, by said Springvale Ditch Company to said defendant in error; and the said final decree here complained of also enjoined the plaintiff in error from interfering with the use by defendant in error of the channel of said creek for the purpose of conveying the water aforesaid down to the headgate of the ditch of defendant in error, and its diverting the same into its ditch. The suit was instituted by the defendant in error against James R. Johnston, Lizzie D. Johnston, George D. Johnston, and Harry Homer Johnston, and George W. Snow, as water commissioner.

* * * * * * *

Primarily the respective rights of the contesting parties to the water in controversy is based upon a decree of the State Board of Control adjudicating the priorities on the stream in question. By that decree the Springvale Ditch Company was awarded priority No. 8, for ten cubic feet of water per second of time, for the irrigation of 700 acres of land; the plaintiffs in error were awarded priority No. 9, for 7.71 cubic feet, to irrigate 540 acres of land; and the defendant in error, priority No. 10, for 17.14 cubic feet, for the irrigation of 1,200 acres of land. The ditches of

the owners of the three priorities above named relatively connect with the stream about as follows: The headgate of the Johnston ditch is located near the head of the stream; the headgate of the ditch of the Springvale Ditch Company, two and one-half miles below the headgate of the Johnston ditch; and the ditch of defendant in error has its headgate two and one-half miles below the headgate of the Springvale ditch.

The appropriations under which the parties named obtained their respective priorities were made prior to statehood, and before the adoption of our constitution and the creation of the State Board of Control. Proceedings were pending at the time of the adoption of the constitution in one of the district courts of the state for the determination of the various priorities upon the stream in question. And following the enactment of the law by the first state legislature with reference to the adjudication of water rights by the Board of Control, the said proceedings, by virtue of one of the provisions of that act, were transferred to the Board of Control, by whom the final decree of adjudication was rendered. On October 30, 1894, the Springvale Ditch Company made and executed its deed to the Little Horse Creek Irrigating Company, the defendant in error here, whereby it conveyed to said defendant in error and undivided one-half of the interests of the grantor in and to the waters of the Little Horse Creek that had been adjudged to said grantor by the Board of Control; and it was recited in said deed that: "The said waters hereby conveyed and the use thereof being intended to be wholly severed from the lands of the party of the first part or any other person and from use thereon; it being the intention of the said party of the first part to convey to the said party of the second part an undivided one-half in and to all the rights which it may have acquired to the use of the waters of said Little Horse creek, as involved within the adjudication aforesaid; and to convey the same to the said party of the second part as fully and entirely as it may lawfully do, and to convey to the said party of the second part, the unrestricted use thereof by the party of the second part in the irrigation of lands at such point or points as he may elect to use the same." It was expressly agreed by and between the parties to said instrument, by provision therein inserted, that the said parties, beginning on the 1st day of March in each year, should use the waters that had been adjudged to the grantor as follows: The party of the first part, viz., the Springvale Ditch Company, shall be permitted to use all the waters for the term of one week. At the expiration of that time the second party, the Little Horse Creek Irrigating Company, shall be authorized to use all the waters so adjudged for the period of one week; and so, alternately, the said waters shall be used by the parties, respectively, each using all the waters one week at a time, and no longer, during all of the irrigating season of each and every year,

and so long as the said parties, or either of them, shall desire to use the said water in any year. The evidence discloses that after the execution and delivery of this conveyance the waters that had been appropriated by the Springvale Ditch Company were used in the manner set forth in said deed; the defendant in error diverting the waters for its use into its ditch, located about two and one-half miles below the ditch of the Springvale Ditch Company, and the latter company diverting the water, when it used it, into its own ditch, by means of which the original appropriation had been effected. It appears that the plaintiffs in error, considering the sale of an interest in said water right to be invalid and to confer no right or title upon the grantee, and that it amounted to an abandonment on the part of the Springvale Ditch Company of one-half of its original appropriation, sought and claimed the right to use the same as the next succeeding appropriator. And it is contended on behalf of plaintiffs in error that a sale of a water right separate from the land for the irrigation of which the water was appropriated is not permitted under the laws of this state. This raises the important question in the case.

In Frank *v.* Hicks, 4 Wyo. 502, it was held that a water right acquired for the irrigation of lands is an appurtenant to the land, and passes with a conveyance of the realty, without being specifically mentioned; but it was said by Mr. Justice Conaway, who delivered the opinion in that case: "It is true that by all the authorities the water right is separable from the land to which it is appurtenant, and may be sold separate from the land, and the place of diversion and the place of use may be changed. But this is only when these acts are not injurious to the rights of others." And in the case of McPhail *v.* Forney, 4 Wyo. 556, the same learned justice said: "As held in the case of Frank *v.* Hicks, decided at the present term [4 Wyo. 502], a right to the use of water for purposes of irrigation, together with the ditch or other conduit for the water, may be conveyed separate from the land upon which the water is used. It seems that this is what has been done with the water right involved in this case."

We are aware that, notwithstanding the expressions and decisions in the cases above mentioned, which decisions were rendered in 1894, prior to the execution of the deed in question, there has existed in the minds of the administrative officers of the state, charged with the execution of the laws governing the appropriation and distribution of water, an opinion that, by reason of some provisions of our statutes unlike the statutory provisions prevailing in most of the other arid states, water appropriated for the irrigation of land becomes not only appurtenant thereto, but inseparably connected therewith, and therefore incapable of transfer or conveyance separate from the land; and the opinion, we understand, has prevailed among such officers, that in the cases aforesaid the effect of our peculiar statutory provisions was

not considered. In view of the fact that such decisions were rendered before the conveyance in question, and that the parties presumably relied thereon in granting and receiving the conveyance, the law ought to be found very clear to justify the court at this time in overruling them and holding the transfer void.

It is not denied, nor can it be, that it has uniformly been held in this country, wherever the doctrine of prior appropriation is recognized, that a water right obtained by and for the irrigation of land may be sold separate therefrom. Gould on Waters, sec. 234; Kinney on Irr., secs. 264, 265, and cases cited; Long on Irr., sec. 79; 3 Farnham on Water and Water Rights, secs. 643, 679. Mr. Farnham says in section 679 of his work above cited: "The right acquired by an appropriation of water being a property right, it is subject to transfer, the same as any other species of property; and this transfer may be separate from the land upon which it was intended to be used. And this sale may include all of the right to which the vendor is entitled, or it may be limited to a portion of it." And in section 643 the same author says: "But there is no reason why it should remain attached to the land in connection with which it was first used, and therefore the rule is that it may be sold separate from the land."

As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he can not sell surplus water which he does not need, while retaining his original appropriation; and it has been held that, as against a subsequent appropriator, a senior appropriator can not give the water he does not use to another for a certain period, who otherwise would have no right to use it. Manning *v.* Fife, 17 Utah 232. So far as we are informed, however, every case in which that or a similar principle has been decided admits that the water right may be sold and conveyed separate from the land, provided other appropriators are not injuriously affected by such sale.

An individual appropriator of water for irrigation secures no surplus water; hence he has no surplus which he can either sell or give to another, as against subsequent appropriations. His appropriation, and therefore his water right dependent thereon, is at all times limited, within the maximum of his appropriation, to the quantity capable of beneficial use, and actually so used. If during any period he does not require the use of the water, it falls during that period to the subsequent appropriator who does need the same and can beneficially use it. What the appropriator may sell is his water right. That is all he has to sell. That is all that would pass by deed of the land as an appurtenance. The water in the stream is not his property, but his right to use that water, based upon his prior appropriation for beneficial purposes, is a property right, and, as such, is capable of transfer. The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authori-

ties, is that it shall not injuriously affect the rights of other appropriators. In other words, the burden upon the use must not be enlarged beyond that which rested upon it under the original appropriation, and while in the hands of the original appropriator as he was entitled to and did use it. This principle is the necessary result of the fact that the only property in the water owned by the appropriator is a right to use it as measured by his appropriation.

But it is insisted that, under the statutes of this state concerning the acquisition of water rights, an entirely different rule must prevail. It is not contended that there is any statute expressly prohibiting a sale of a water right acquired for the irrigation of land separate therefrom; but the claim is that, because of certain provisions in our statutes, such a prohibition is necessarily implied. That result is supposed to follow from the provision in section 873, Rev. St. 1899, which prescribes the form and contents of the certificate to be given to the appropriator after determining the priorities by the Board of Control, where it is provided that, if such an appropriation be for irrigation, the certificate shall contain a description of the legal subdivisions of land to which said water is to be applied; and the provision in section 917, Rev. Stat. 1899, that before any person intending to acquire a water right shall commence the construction, enlargement, or extension of any ditch or other distributing works, he shall apply to the state engineer for a permit to make such appropriation, in which application the nature of the proposed use must be stated, among other things; and a map to be filed with such application, as required by section 924, is required to show the location and area of all land proposed to be reclaimed; and, upon the completion of such an appropriation in accordance with the application, a certificate is required to be sent to the county clerk of the same character as that described in section 873; and the provision in section 872 that no allotment shall exceed more than one cubic foot of water for each seventy acres of land for which the appropriation was made. It may be conceded that the various provisions in the statute requiring a showing as to the lands to be irrigated, and a description thereof in the final certificate of appropriation, tend to emphasize the principle that a water right acquired for the irrigation of lands becomes appurtenant to the lands irrigated, but we are unable to give to such provisions the interpretation contended for by the learned counsel for plaintiffs in error. They do not, in our judgment, have the effect, in any true sense, of destroying the reason upon which the right of sale separate from the land is upheld. They do not, in our judgment, have the effect to declare that the right to use water acquired by appropriation is not in itself a property right, nor can any of the provisions to be found in our statute be legitimately construed as either expressly or impliedly depriving the right of its qualities

as property which it otherwise might have, and which in every other state is conceded to it.

In the able argument of counsel for plaintiffs in error, reference is made to the fact that in the state of Idaho constitutional and statutory provisions have been enacted for the purpose of rendering the water right acquired for the irrigation of lands forever incapable of separation therefrom by transfer, and we understand that in the statutes of that state there is a provision that the right of the water user shall not be considered as being a property right in itself, but that it shall become appurtenant to the land. It must be conceded that the Idaho statutes go much further than the statutes in this state in their declaration concerning the nature of a water right acquired for irrigation. The Idaho statutes referred to have, however, been considered by the supreme court of that state, and the majority of that court held that users of water from a ditch or canal acquired such a property right as they may transfer to other lands under such ditch or canal, and that they may also sell and transfer the right to use such waters, and the purchasers may transfer it to other lands under the ditch or canal, so long as the change of place does not interfere with the rights of others. Hard *v.* Boise City Irr. and Land Co., 9 Idaho 589, 65 L. R. A. 407. See, also, Boise Irr. and Land Co. *v.* Stewart, 10 Idaho 38. In the case first above cited, Mr. Justice Ailshie, in a concurring opinion, held that the provision that a water right should not be a property right in itself, ought not to deprive such right of the character and quality which constitute it property; and Mr. Justice Stockslager, in delivering the opinion of the court, said: "That a party may change the point of diversion when he takes water from a natural stream is a settled question, provided he can do so without injury to any other appropriator of the waters of the same stream. We do not think it material whether he takes it to other land than that for which it was first appropriated; the only question being, can he so change the place of diversion without injury to some other appropriator? That a party has such property interest in water appropriated and used for useful and beneficial purposes that he can sell, we think, is beyond controversy; but the buyer can not take the water to other lands than that for which it was appropriated, to the detriment of any other appropriator, is equally well settled. If, however, he can use it upon other lands more beneficially, where could there be a well-founded objection to such change?" There was a dissenting opinion in the case, but even that opinion recognizes the right of an original appropriator and owner of a water right to sell and transfer the right to be used upon other land.

In the brief of counsel for plaintiffs in error, much is said with reference to the policy of the rule permitting a sale of a water right separate from the land; and counsel has submitted with

such brief the views of a former state engineer of this state, who worthily occupies an eminent position as an irrigation engineer, and whose ability is unquestioned, and for whose opinions the members of this court entertain a high regard. We are, however, of the opinion that many of the objections to the doctrine that has been so firmly settled by the courts are fanciful, and that legislation in conformity therewith is capable of enactment which would remove many of the objections from the standpoint of an intelligent execution of the laws governing the distribution of the public waters. In view of the persistency with which such objections are entertained, and the earnestness with which they are continually urged by those engaged in administering our laws on the subject of water appropriations, and the able presentation thereof by counsel, some reference to them seems advisable.

It is asserted that the doctrine of sale separate from land is the doctrine of the courts, and not of irrigators. It is, of course, true that the public announcement of the doctrine is to be found in the decisions of courts; but, had the owners of water rights not conceived that they had a property in their right to use water which they could convey for use on other lands, there doubtless would have been no conveyances to be considered by the courts. We can not agree that the doctrine has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more competent than the courts to determine the legal principles controlling the use of water by prior appropriation, notwithstanding that the judges may not, as a rule, be practical irrigators. The fact that judges have not been engaged in banking or commercial pursuits, or in managing railroads or other corporate interests, has not been put forward as an argument to combat the justness of the legal rules and doctrines that govern financial and commercial transactions, or that prescribe the duties and powers of railroad companies or other corporations. Legal doctrines in this country have generally come from the courts, and must, in the nature of the constitution of our government, continue so to do, except where, within its province, the legislature declares what the law shall be. Indeed, the courts first announced the doctrine of prior appropriation. The law of this state conferring certain powers upon the Board of Control makes the courts the ultimate judges in case of controversy on appeal; and the courts surely are as much empowered, within the extent of their jurisdiction, to announce doctrines, as are administrative boards. We have no doubt, however, of the wisdom of the policy which places the initial determination of priorities in the hands of such a board.

It may be accepted as true that the rule permitting the sale of a water right separate from the land has been the source of

litigation. But that affords no sufficient reason for destroying property rights. We can not agree that, in order to discourage litigation or render it impossible, the courts should divest the citizen of his property.

Counsel seem to treat the sale in controversy, and the question generally of the right of sale separate from the land, as a sale of the water itself. But the conveyance does not sell water. The appropriation was made by the use of water for the irrigation of land, and thereby a water right was obtained, the nature of which is well understood and settled. The deed conveys an interest in that water right. The interest conveyed passed out of the hands of the original appropriator into the hands of its grantee. It became severed from the land to which it was originally attached, it is true, but it immediately became attached to other land. In the hands of the grantee the right became appurtenant to the land upon which the grantee intended and did apply it. Should the grantee not apply the right to a beneficial use, he could not, of course, retain it. The grantee can by nonuser abandon the right in the same manner as the original appropriator. This is not a case where an appropriator for irrigation purposes seeks to hold the water for purpose of sale. The matter stands in the same situation as though the grantor and grantee had originally made the appropriation, and secured the water right in the proportions stated in the deed. The appropriator secured a property right. A portion of that right it sold to be beneficially applied to other lands. It sold, not water, but the right to use water; in other words, a water right.

We cannot agree that it requires a strained and distorted interpretation of our statutes to uphold the doctrine permitting the sale of a water right separate from the land. On the contrary, it would require a strained construction of the statutes to deny such a right. There is no reasonable indication in the statutes, in our opinion, that the requirements for describing the land to be irrigated in application for permits or in certificates of appropriation was adopted on the theory that the water right becomes inseparably attached to the particular land, so as to forever be incapable of transfer to other lands. A more reasonable view of the purpose of the requirement is to show that an actual, beneficial use has been or is intended to be made of the water claimed to have been appropriated or intended to be appropriated; and to enable those charged with the duty of adjudicating priorities to determine upon some definite basis the amount and quality of the appropriation, as well as to preserve a convenient record of water rights as appurtenant to certain tracts of land. But the fact that the legislative development of this growing subject has failed to provide for a record of transfers of the right to other lands, which we think might be done, is

not to be held ground for holding that the right of transfer does not exist.

To adopt the view contended for against the validity of the conveyance in question would, in our judgment, require us to deny the element of property in the water right itself. Nothing in the decisions on the subject or in the statute authorizes that. The water right, when sold, does not become, as suggested, a mere "floating right." It becomes appurtenant to other land, if it is intended by the grantee for irrigation, or else is devoted to other equally beneficial uses. Without some beneficial use after sale, it would doubtless, on a proper showing, be held abandoned, as in the case of an original appropriator who should intentionally cease to use it. Moreover, judging from the board's decree in this case, it would seem that the administrative officers have not adhered very strongly to the proposition that the statutes require a dscription of the land for the purpose of inseparably attaching the water right to the particular tract irrigated. The decree awarded to the Springvale Ditch Company a designated water right for the irrigation of 700 acres of land. But the particular tracts irrigated were not described, except that the said 700 acres are described generally as being located within certain larger tracts, in the aggregate amounting to about 1,840 acres. This might, perhaps, permit the appropriator to apply the water during one season to one part of the land described, and to another part in another season, and this may be the custom in farming under irrigation. To carry the theory contended for to its legitimate and logical conclusion would seem to require the particular area through the irrigation of which the appropriation was made to be described minutely, and thereby show that the water right did not appertain to any other part of the land owned by the appropriator. But the statute evidently does not require such minutia of description, since it provides only for a description of the legal subdivisions to which the water is to be applied.

In view of the fact that the doctrine maintained in other states of the arid region must have been well known to those interested in our legislation, it is significant, it seems to us, that no express legislative declaration on the question has been incorporated in our statutes. And is it not also significant that notwithstanding the expressions of this court in 1894, in the cases cited in an earlier part of this opinion, the statutes have continued silent in reference to the matter? It is, moreover, significant that the constitution requires the legislature to provide by law for the exercise by incorporated cities, towns, and villages of the right of eminent domain for the purpose of acquiring from prior appropriators, upon the payment of just compensation, such water as may be necessary for the well-being thereof and for domestic uses. Const., art. 13, sec. 5.

We are deeply sensible of the responsibility attending to a decision of this important question. We have brought to its consideration for some time careful thought and study, and the result is that we can ascertain no reasonable ground for departing from the well-settled principle so firmly and uniformly upheld by all the authorities. We can perceive nothing in the fundamental principles underlying the doctrine of prior appropriation in the use of water that interferes with the right of sale of the water right, but, on the contrary, those principles seem to be in harmony with such right. Should the theory be adopted that water appropriated for the irrigation of a certain tract of land must be forever connected with that particular tract, and can not be separated therefrom in any manner by sale, by any other equally beneficial use, or otherwise, much injustice might be caused by reason of the failure of the particular tract to further respond to the skill of the husbandman. It might become valueless for many reasons unnecessary to mention, and the appropriator who may have expended much money and time in completing the appropriation would be compelled to forfeit it instead of supplying it to other lands. The state, certainly, as trustee of the water, and interested in its conservation and economical distribution, can hardly be concerned in having a particular tract of land irrigated in preference to any other. Moreover, forfeitures have never been favored in the law. But is it not a conclusive answer to the proposition for the new theory that there is no principle of law upon which it can be logically or reasonably based?

The evidence in this case shows that after the conveyance of the water right in question the grantor, the Springvale Ditch Company, irrigated not more than one-half as much land as it had previously irrigated, and the grantee applied the water which it obtained under the conveyance to the irrigation of 180 acres of land. This is not an increase over the quantity of land previously irrigated, and there is nothing in the testimony showing or tending to show that the use of the water since the transfer has resulted in an injury to the plaintiffs in error. Indeed, it is not claimed that they have been injured, except upon the theory that they were entitled, as the next succeeding appropriators, to any water which the Springvale Ditch Company may have abandoned. It must be understood that this case does not present any facts showing a sale of surplus water. The evidence discloses, without contradiction, that the entire amount of the maximum allowed to the Springvale company was seldom, if ever, used, for the reason that the stream did not supply sufficient water in ordinary seasons, at least, to allow such use. There is no evidence of waste. There is no showing that either of the parties to the deed used more water than they actually required.

It is suggested that the decree commands the plaintiffs in error

at all times to refrain from any interference with the maximum quantity allowed by the board to the Springvale Ditch Company, in disregard of the custom and necessities of persons engaged in cultivating land by irrigation. It is said, in substance, that an appropriator does not require, and never actually uses, a uniform, continuous flow of a certain volume of water; that the allowance of a certain quantity is intended only as a maximum limit as to the use at any one time, but that water is generally used only about three months, and the maximum not over thirty days. Conceding all this, it is not apparent that the decree is to be interpreted as permitting the defendant in error to waste any of the water. If it did, it might require modification. The injunction is against interfering with the use and enjoyment by the defendant in error of the water to which he is entitled. It clearly can not operate to prevent the taking of any water which is not required by the defendant in error for the irrigation of the lands to which it is applied, nor do we think it was intended to so operate. The rule must be the same as between any other appropriators. Long on Irr., sec. 61.

There is nothing in the law of prior appropriation that prevents a change of the place of diversion if that can be accomplished without injury to others. We are unable to discover in the evidence anything to show that the plaintiffs in error are injured by the diversion of the water under the conveyance at the headgate of the ditch of defendant in error, instead of at the point where it was originally diverted by the Springvale Ditch Company.

Neither do we discover from the evidence that the use of all the water by the owners on alternate weeks, respectively, as provided in the deed, operated to the detriment of the plaintiffs in error. Such an agreement between several persons who have appropriated water as tenants in common does not seem to be objectionable in itself. Long on Irr., secs. 61, 85; Kinney on Irr., secs. 301, 302; Lytle Creek Water Co. *v.* Perdew, 65 Cal. 452; Cache la Poudre Irr. Co. *v.* Larimer & Weld Res. Co., 25 Colo. 144, 71 Am. St. 123; Meagher *v.* Hardenbrook, 11 Mont. 385. It is, of course, true that the defendant in error, as against subsequent appropriators, could use only so much as he could use beneficially. The deed having conveyed an undivided one-half of the water right to the defendant in error, the parties thereupon stood in relation to each other the same as if they had originally made a joint appropriation.

The record disclosing no error, the judgment will be affirmed.[27]

Corn, C. J., concurs.

[27] See Wiel, Water Rights in the Western States (3d ed.), §§ 508-512; Wyoming Comp. Laws 1910, § 724; Utah Comp. Stat. §§ 1288x31-1288x34; 1288x24; Henning's Gen. Laws of Cal. 1914, p. 2182, § 39 of Act 5489, pp. 2226, 2228, §§ 3 and 12-15 of Act 5534, pp. 2172, 2174, 2175, 2183, §§ 11, 14, 16, 44 of Act 5489.

SEVEN LAKES RESERVOIR CO. *v.* NEW LOVELAND AND GREELEY IRRIGATION AND LAND CO.

1907. SUPREME COURT OF COLORADO.

40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329

The question presented by this appeal is the right of the owner of a priority for direct irrigation to store the water thereby represented for use later in the season. Appellant is a corporation, organized under the laws of this state for the purpose of acquiring and maintaining reservoirs for the storage of water to supplement the water supply of its stockholders obtained through the Loveland & Greeley ditch to irrigate lands belonging to them under this ditch. Pursuant to this purpose it acquired reservoir sites, and purchased thirty-four shares of the Louden Irrigation Canal Company and fifty inches in the Barnes ditch. The priorities belonging to these ditches were awarded for direct irrigation purposes. The water represented by these purchases it did not apply to lands directly, but, during the irrigating season, stored in one or more if its reservoirs for use upon lands later to mature crops, like beets and potatoes, which it is not necessary to irrigate in the early part of the season, but which do require water about August, and later, when the direct supply belonging to its stockholders in the Loveland & Greeley ditch was insufficient for this purpose. The several ditches named derive their respective supply from the same general source. Appellee, the owner of priorities supplied from this same source, brought a suit against appellant, the object of which was to prevent the appellant from diverting the water represented by its purchases during the irrigation season for storage. To the complaint filed the appellant filed a cross-complaint, claiming the right to divert the water represented by its purchases for storage purposes, based substantially upon the grounds above stated. There was no dispute with respect to the dates and amounts of the respective priorities of the parties to the action involved in this appeal; it being the contention on the part of plaintiff that, although the defendant was entitled to divert the water represented by its purchases for the purpose of direct irrigation when needed, and that these priorities for this purpose were superior to any claimed by plaintiff, the defendant could not abandon the use of the rights purchased by it for direct irrigation during the irrigating season, and store the water thereby represented for future use in irrigating crops. The judgment of the court was in favor of the contention of the plaintiff, and the defendant brings the case here for review on appeal.

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GABBERT, J. (after stating the facts as above): The particular question presented by this appeal has not been determined in the concrete by any previous decision of this court; but it is by no means a new one, because it merely involves the application of principles which have been announced in numerous cases. A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others. Fuller *v.* Swan River P. M. Co., 12 Colo. 12; Strickler *v.* Colo. Springs, 16 Colo. 61, 25 Am. St. 245; Cache la Poudre I. Co. *v.* Larimer & Weld R. Co., 25 Colo. 144, 71 Am. St. 123.

Appellant owns certain rights to the use of water, which, prior it its purchase, had been directly applied to the irrigation of lands. Instead of continuing to so use this water, it has ceased its direct application during the period it was theretofore applied, and stores the water which it would have the right to thus apply for use later in the same season. This change is in no manner detrimental to the rights of the appellee. It is not thereby deprived of any water which it would have the right to divert and apply to lands during the irrigating season as against the rights of the appellant. By the change no greater burden is imposed upon the common source of supply of the respective ditches. It must therefore logically follow that the appellant is entitled to divert the water represented by its purchase, and store for use later in irrigating crops, measured by volume and time, which it would have the right to apply directly to lands for purposes of irrigation at the time of such diversion.

The case presented is not one, as seems to have been the view of the trial court, where appellant seeks to convert a junior reservoir right to a senior appropriation for storage, but merely involves the right of appellant to utilize a priority for irrigation by using it at a later period. It appears from the record that the stockholders of appellant, instead of planting crops which require irrigation during the early part of the season, utilize their lands by growing crops which do not require irrigation until about August, when the direct supply through the ditches is not sufficient to furnish the volume of water necessary to irrigate such crops. And so, instead of applying the water to which they are entitled for direct irrigation in the early part of the season, they store this water for use later to mature crops, like beets and potatoes, which do not require irrigation until about the month of August. It would be unfortunate indeed if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits. If water for direct irrigation can only be utilized for that purpose, the result would be to retard agricultural progress, and limit the growth of agricultural products to those which can

be matured by means of direct irrigation early in the season. If the judgment of the trial court should be sustained upon the theory that one owning a priority for direct irrigation may not cease to utilize it for that purpose upon crops in May, June and July, and store it for use during the same season thereafter, the result would be to take from the owner of such a priority his rights and confer them upon others growing crops of a different nature. Such a rule would make the right to the use of water dependent upon the character of crops grown instead of upon the right to utilize it in any manner which does not injuriously affect the vested rights of others. In principle the case is no different from that of Strickler *v.* Colorado Springs, supra, wherein the right to change the use of water from agricultural to domestic purposes was recognized. If the right to change from agricultural to domestic, and from mining to agricultural, uses, and vice versa, is legal, certainly no good reason can be advanced why the change from one agricultural use to another may not be allowed.

The trial court seems in a measure to have been guided in rendering the judgment it did by sec. 2270, 1 Mill's Ann. Stat., which provides that persons desiring to divert water for storage may take "from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes." We do not think this section is involved, because appellant is not asserting any right to the water in controversy by virtue of any appropriation for reservoir purposes, but is merely seeking to utilize priorities which it is conceded it is entitled to for direct irrigation purposes by storing the volume to which it is thus entitled for use at a later period. We are of the opinion that the appellant is entitled to so utilize these priorities, that is to say, entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation.

The judgment of the district court, in so far as it involved the rights of the parties to this appeal to the water represented by the stock purchased by appellant in the Louden Irrigation Canal Company, and the purchase of water in the Barnes ditch, is reversed, and the cause remanded, with directions to the trial court to enter a judgment in favor of appellant with respect to these matters in accordance with the views expressed in this opinion.

Judgment reversed.

Steele, C. J., and Campbell and Caswell, JJ., dissent.

On Petition for Rehearing

Gabbert, J.: The arguments of counsel for appellee, and amici curiae in support of the petition for rehearing of appellee are evidently based upon an erroneous assumption of what has been determined

in this case. It is contended that adjudication decrees are disturbed, and that appellant by the decree directed, will be awarded an enlarged use of water represented by its purchases, both in quantity and time. It must be borne in mind that this decision is based upon the fact, which is undisputed, that the stockholders of appellant are growing crops which do not, from their nature, require irrigation during the early part of the season, but do later, and that they desire to utilize the water in controversy for this purpose. Based upon these facts we have declared, what has time and again been decided by this court, that the character and method of use of a priority to the use of water may be changed, provided such change does not injuriously affect the rights of others, and that appellant is entitled to divert and store the water represented by the priorities purchased for the use of its stockholders for application to crops later, but in no greater quantity and at no other or different time than could be diverted and applied to land directly to nourish crops requiring irrigation at the time of such diversion; or, otherwise expressed, appellant is permitted to divert and store the water in controversy, but this right is measured and fixed by the limitations which the law would impose upon its use for diversion and application to crops requiring irrigation at the time of such diversion. This does not conflict with any previous decisions of this court; but, on the contrary, is sustained by Colo. M. & E. Co. *v.* Larimer & Weld I. Co., 26 Colo. 47. See also, Mills' Irrigation Manual, sec. 56. This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it the right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the nonirrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated. Thus it is apparent that no rights are infringed, that no one is deprived of water to which he is entitled by reason of the change in the method of use, and that to supply appellant with the water which it will be entitled to store under the decree directed there can not possibly be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties to this appeal. Neither are any priorities disturbed; but, on the contrary, the decree directed leaves the relative rights of the parties to this appeal precisely as they were, whereas, if the judgment of the lower court should be affirmed, the result would be, where an appropriator had no use for water represented by his priorities in the early part of the season because of the fact that he was growing crops of a character which did not require irrigation during that period, and he could not store it at that time for use upon these crops, when later it was necessary to irrigate them, to take from him and give to another.

It is contended by counsel that the decision in this case is contrary to New Loveland & Greeley I. & L. Co. *v.* Consolidated Home Sup-

ply Ditch Co., 27 Colo. 525, 52 L. R. A. 266, and Fort Lyon Canal Co. *v.* Chew, 33 Colo. 392. In the New Loveland case it was determined that the appropriation of water for the irrigation of lands during the irrigation season gave the appropriator no priority of right to store water during the nonirrigating season for future use. This does not conflict with the opinion in the case at bar. No right to store water during the nonirrigating season is conferred. The gist of the decision in the Chew case is that the owner of a water right would not be permitted to make it do double duty. When he had applied it for the purpose for which it was appropriated, he could not loan or lease it to another for irrigation purposes; but that is not this case. The stockholders of appellant do not at once apply the water diverted; but appellant is allowed to divert and store for their use the volume of the priorities in question, which it would be entitled to divert for application by its stockholders to land directly, to mature crops requiring water at the time of such diversion, so that but one use of the appropriations in question is made, and that use does not, under the limitations we have specified, result in any greater draft upon the river than if the water had been directly applied to land at the time of diversion.

It is also urged that no decree of the character directed should be entered until all the parties whose rights might be affected thereby are before the court. No question of that character was suggested at the original hearing, and it will not be considered on an application for a rehearing. Besides we do not believe appellee is in a position to urge that question. Appellee instituted the action from which this appeal was prosecuted, making the appellant the only party. The purpose of the action was to prevent the appellant from diverting the water represented by its purchase during the irrigation season for storage as against the appellee, and hence it is not in a position to now contend that the rights which it now seeks to have determined as between the appellant and itself should not be adjudicated without the presence of other parties whose rights might be affected by such adjudication. Counsel amici curiae also say, quoting from their brief: "Many members of the legal profession, and many irrigators, contend that this decision enables the holder of old decrees for excessive priorities—decrees obtained in the early days, when water rights were not so valuable as now, nor so carefully guarded—to successfully assert that the full amount of water decreed may be now used, notwithstanding that but a portion of it has ever been heretofore used. They maintain that the old priorities, whether used or not, are recognized by this decision to such an extent that the owners of those priorities are, as against even subsequent appropriators who have used the water for years, entitled to now utilize it upon lands described in the decree, or other lands owned by them."

Such a case is not before us; but we can only say that we fail to

in this case. It is contended that adjudication decrees are disturbed, and that appellant by the decree directed, will be awarded an enlarged use of water represented by its purchases, both in quantity and time. It must be borne in mind that this decision is based upon the fact, which is undisputed, that the stockholders of appellant are growing crops which do not, from their nature, require irrigation during the early part of the season, but do later, and that they desire to utilize the water in controversy for this purpose. Based upon these facts we have declared, what has time and again been decided by this court, that the character and method of use of a priority to the use of water may be changed, provided such change does not injuriously affect the rights of others, and that appellant is entitled to divert and store the water represented by the priorities purchased for the use of its stockholders for application to crops later, but in no greater quantity and at no other or different time than could be diverted and applied to land directly to nourish crops requiring irrigation at the time of such diversion; or, otherwise expressed, appellant is permitted to divert and store the water in controversy, but this right is measured and fixed by the limitations which the law would impose upon its use for diversion and application to crops requiring irrigation at the time of such diversion. This does not conflict with any previous decisions of this court; but, on the contrary, is sustained by Colo. M. & E. Co. *v.* Larimer & Weld I. Co., 26 Colo. 47. See also, Mills' Irrigation Manual, sec. 56. This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it the right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the nonirrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated. Thus it is apparent that no rights are infringed, that no one is deprived of water to which he is entitled by reason of the change in the method of use, and that to supply appellant with the water which it will be entitled to store under the decree directed there can not possibly be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties to this appeal. Neither are any priorities disturbed; but, on the contrary, the decree directed leaves the relative rights of the parties to this appeal precisely as they were, whereas, if the judgment of the lower court should be affirmed, the result would be, where an appropriator had no use for water represented by his priorities in the early part of the season because of the fact that he was growing crops of a character which did not require irrigation during that period, and he could not store it at that time for use upon these crops, when later it was necessary to irrigate them, to take from him and give to another.

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ply Ditch Co., 27 Colo. 525, 52 L. R. A. 266, and Fort Lyon Canal Co. *v.* Chew, 33 Colo. 392. In the New Loveland case it was determined that the appropriation of water for the irrigation of lands during the irrigation season gave the appropriator no priority of right to store water during the nonirrigating season for future use. This does not conflict with the opinion in the case at bar. No right to store water during the nonirrigating season is conferred. The gist of the decision in the Chew case is that the owner of a water right would not be permitted to make it do double duty. When he had applied it for the purpose for which it was appropriated, he could not loan or lease it to another for irrigation purposes; but that is not this case. The stockholders of appellant do not at once apply the water diverted; but appellant is allowed to divert and store for their use the volume of the priorities in question, which it would be entitled to divert for application by its stockholders to land directly, to mature crops requiring water at the time of such diversion, so that but one use of the appropriations in question is made, and that use does not, under the limitations we have specified, result in any greater draft upon the river than if the water had been directly applied to land at the time of diversion.

It is also urged that no decree of the character directed should be entered until all the parties whose rights might be affected thereby are before the court. No question of that character was suggested at the original hearing, and it will not be considered on an application for a rehearing. Besides we do not believe appellee is in a position to urge that question. Appellee instituted the action from which this appeal was prosecuted, making the appellant the only party. The purpose of the action was to prevent the appellant from diverting the water represented by its purchase during the irrigation season for storage as against the appellee, and hence it is not in a position to now contend that the rights which it now seeks to have determined as between the appellant and itself should not be adjudicated without the presence of other parties whose rights might be affected by such adjudication. Counsel amici curiae also say, quoting from their brief: "Many members of the legal profession, and many irrigators, contend that this decision enables the holder of old decrees for excessive priorities—decrees obtained in the early days, when water rights were not so valuable as now, nor so carefully guarded—to successfully assert that the full amount of water decreed may be now used, notwithstanding that but a portion of it has ever been heretofore used. They maintain that the old priorities, whether used or not, are recognized by this decision to such an extent that the owners of those priorities are, as against even subsequent appropriators who have used the water for years, entitled to now utilize it upon lands described in the decree, or other lands owned by them."

Such a case is not before us; but we can only say that we fail to

comprehend wherein the opinion is susceptible of such a construction. It would be impossible, in any one opinion, to determine all the questions which may arise with respect to water rights. Each case of this character must depend upon its own particular facts.

A majority of the court is of opinion that the petition for rehearing should be denied, and it is so ordered.

Rehearing denied.[28]

CACHE LA POUDRE RESERVOIR CO. *v.* WATER SUPPLY AND STORAGE CO. ET AL.

1898. SUPREME COURT OF COLORADO

25 Colo. 161, *53 Pac.* 331, *46 L. R. A.* 175, *71 Am. St.* 131

CAMPBELL, C. J.: The appellant here was plaintiff, and the appellees were defendants, below. For the sake of brevity and convenience, in the opinion the appellant is designated as the "plaintiff," and the defendant Water Supply & Storage Company as the "Water Company," and the Colorado Milling & Elevator Company as the "Milling Company." The ultimate and substantial facts alleged in the voluminous complaint are in the main fairly summarized by defendants' counsel in their brief, as follows: In 1868 the defendant Milling Company constructed a ditch diverting from the Cache La Poudre river 60 cubic feet of water per second of time, to be used in propelling its mill machinery, and then, undiminished in quantity and unimpaired in quality, discharged the same into the river. Such use the Milling Company has made of the water continuously from that time to the present, both winter and summer, nights and days, excepting only when, for some cause, the mill was not in actual operation. In 1881 the defendant Water Company constructed a ditch taking water directly from the river at a point above the head gate of the Milling Company's ditch, and the uses actually made of such appropriation were the irrigating of agricultural lands during the summer season, and the storing of water, outside of the winter months, in certain of its reservoirs, having an aggregate storage capacity of 500,000,000 cubic feet, and then using it in the latter part of the season for irrigating lands belonging to its stockholders. In 1892 the plaintiff Reservoir Company constructed a ditch taking water from the river at a point

[28] Cf.—Colorado Milling and Elevator Co. *v.* Larimer and Weld Irrigation Co., 26 Colo. 47, 56 Pac. 185; New Loveland and Greely Irrigation and Land Co. *v.* Consolidated Home Supply Ditch and Reservoir Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266; Greeley and Loveland Irrigation Co. *v.* Farmers' Pawnee Ditch Co. (Colo.), 146 Pac. 247; Kans. Gen. Stat. 1909, § 4435; Colo. Stat. Ann., § 3202.

below the discharge of the Milling Company's ditch; and the object of this appropriation was to store the water in its reservoir, having a storage capacity of 450,000,000 cubic feet, to be used during the late irrigation season for irrigation purposes. There are 65 ditches which rightfully divert and take for irrigation all of the water which flows in the river during the irrigating season, except during the period of floods in the month of June, when there is some water available for storage. Between November 1st and April 1st of each year, prior to the winter of 1892-93, the amount of water which was accustomed to flow in the river down to the place where now is located plaintiff's head gate was about 60 cubic feet per second; sometimes more, sometimes less. During this winter the 60 cubic feet of water diverted and used by the Milling Company for propelling its machinery, and afterwards discharging into the river, flowed down and was taken into the head gate of the plaintiff company's ditch, where it was by it diverted and stored in its reservoir. Beginning with the winter of 1893-94, and continuing during the following winter, the defendant Water Company diverted the waters of the stream on Sundays and at such other times as the mill of the defendant Milling Company was not in actual operation, and thereby intercepted the flow of said 60 feet, which during the winter of 1892-93 and theretofore ran continuously and without diminution to the place where now is the head gate of the plaintiff company, and caused this flow to become intermittent, running only at such times as the mill was in actual operation, and then not in the quantity, theretofore flowing, on account of the mill race becoming clogged with ice caused by defendant's wrongful diversion. The defendant Water Company now refuses to recognize that the plaintiff Reservoir Company has any right to divert waters from the river for storage between the 1st of November and the 1st of April to the extent of 60 feet, or to any extent, senior to the right claimed by it to divert waters during the same period for storage in its reservoir; and it claims the right to induce the Milling Company, for a consideration (and proposes and threatens to accomplish that end), to keep idle its mill during all or a part of the winter months, or to cease its operation by water-power, in order that during such time the Water Company may divert water for storage; in other words, that, by collusion, these two defendants threaten to bring about an abandonment by the Milling Company of its right to use its appropriation of water for power purposes, and thus seek indirectly to confer upon the defendant Water Company the opportunity and assumed right to take it out and absorb it at a different place, and for a different purpose, to the injury of plaintiff. It should be borne in mind that it is distinctly alleged in the complaint that prior to the winter of 1893-94, and not until after the plaintiff company had made its ap-

propriation, the defendant Water Company had never diverted in the winter time any water whatever from the river, to the extent of 60 cubic feet or any other quantity, either during nights, Sundays, or at intervals when the mill was not in actual operation, although such temporary nonuse for power purposes had frequently occurred; and that not until after the plaintiff had, as just stated, made its appropriation of all the water flow of the river, including the water discharged from the mill race into the river after having been used to operate the mill, did the defendant Water Company begin its diversion. This diversion, thus for the first time begun by the defendant Water Company, according to the allegations of the complaint, has prevented the plaintiff company from getting into its reservoir during the winter season the waters it is entitled to, and the defendant Water Company threatens to continue its diversion to the detriment of the plaintiff. The Milling Company suffered a default, and the other defendants filed a demurrer to the complaint, containing several grounds, but the only one argued by counsel on this appeal is that the complaint does not state facts sufficient to constitute a cause of action and to this our consideration is confined.

From the foregoing statement it clearly appears that, after the use and subsequent discharge into the stream of the 60 cubic feet of water diverted by the Milling Company, the first beneficial use thereof, as well as of other so-called "winter waters," was made by the plaintiff, and that no attempt was made by the Water Company to cause any waters to flow in its ditch until a year after the plaintiff had actually stored water in its reservoir. Neither party questions the first priority of the Milling Company, so that question is eliminated. The case may first be considered as though all allegations concerning the mill ditch were absent, though this method will occasion some repetition.

To sustain its claim to the first appropriation of the winter waters of the stream, counsel for the Water Company makes a plausible and ingenious argument. It is this: When, in 1881, it conceived its plan for diverting water for irrigation and storage, it was confronted with senior demands existing against the flow of the river for irrigation and milling purposes. Whether these demands were satisfied by means of ditches above or below its intake, defendant was obliged to respect them, irrespective of the character of the use. Though these prior demands absorbed all the waters of the river, yet the quantity actually needed was not at all times equal to its actual volume. Therefore, if there were occasions when all or a portion of the waters were not used, the defendant, for such periods, could acquire a right to divert and enjoy what was not used by senior appropriators; that is to say, although the rights of these senior appropriators, when fully exercised, would consume the entire flow,

yet they may not waste water; and when they did not need all or any portion, a junior appropriator might, at such times, use such unused waters, and, as to the same, would become a prior appropriator himself; or, as expressed in the exact language of counsel: "The moment that a claim to water ceases to be exercised partially or totally, the water in the river from the source to its mouth is relieved to that extent of any legal right in the claimant, and it is, as to succeeding claimants, unappropriated water." For the purposes of this case, we may concede the validity of the argument up to this point, and further concede that this statement defines the status of the defendant company with respect to senior appropriators, and that, when they ceased to use water, it became subject to appropriation. Therefore, as the argument proceeds, the defendant might acquire a right to divert such unused waters, either for irrigation or for storage. Indeed, we might go further, and say that it may have perfected its right thus to take water during the summer season. But the argument stops short here, probably for the reason that the facts of this case require it; for if the water company did not make such an appropriation to be enjoyed during the winter season (which is directly negatived by the complaint) until after the plaintiff made its appropriation, and limited to that season, the latter, as to the volume of water actually appropriated by it, becomes the senior appropriator as to the winter flow.

Applying the foregoing principles to the admitted facts of this case, it appears that, as to 60 cubic feet of water, the plaintiff first appropriated it for storage purposes during the winter season. While the ditch and reservoir of the Water Company were first built, and its facilities for storing winter waters antedated those of the plaintiff, the former did not, as a matter of fact, store, or attempt to divert for storage, any water of the river between November and April of any year until after the plaintiff made its appropriation for that period, during the winter of 1892-93. For aught we know, the Water Company may have a superior right to store waters during other seasons of the year, but, by its demurrer, it admits that the plaintiff made the first appropriation for the winter season. No right is acquired by merely possessing facilities for making an appropriation, unaccompanied by a bona fide attempt within a reasonable time to utilize them. Under our law, an appropriation can be made only by an actual diversion of water, followed by an application thereof, within a reasonable time, to a beneficial use. The fact, therefore, that the defendant Water Company, from 1882 to 1892, and during the winter seasons of those years, neither diverted water nor beneficially applied it until after the plaintiff made its diversion, in 1892, makes the former the junior appropriator, and the latter the senior,—for such periods of time,—as to the quantity actually appropriated by the latter.

While no case in this court may have required the announcement, it seems, both upon principle and authority, that one may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time, and another person an appropriation of a like quantity from the same source during another period, and, as to the same, be a prior appropriator himself. In other words, there is no difference in principle between "an appropriation measured by quantity and an appropriation measured by time." Kin. Irr. sec. 177 et seq., and cases cited; Black, Pom. Water Rights, secs. 69, 91, 92, and cases cited; Barnes v. Sabron, 10 Nev. 217; Smith v. O'Hara, 43 Cal. 371, and cases cited.

But we apprehend that the principal object of the action was to obtain an adjudication of the conflicting claims of the plaintiff Reservoir Company and the defendant Water Company to the Milling Company's appropriation at such times as the latter temporarily ceased to use the same, or in the event that it wholly ceased to use, with no intention of reclaiming its right. Considering the case, then, as it is made in the complaint, with the element of the mill race present, let us see if that makes any difference in the principle just announced. Of the three head gates, that of the Water Company is highest up the stream, and that of the plaintiff the lowest, while the intake of the mill race is between the two. For twenty-four years sixty cubic feet of water per second of time had been continuously flowing into the mill race, and for ten years the Water Company had permitted it to pass by its head gate, recognizing the prior right of the Milling Company thereto; and during these years, even when the Milling Company ceased temporarily to use it in operating the mill (as it frequently did for short periods of time), the Water Company, during the winter season, did not attempt to make any use of the Milling Company's appropriation. After this volume of water fulfilled its mission of running the mill machinery, it was turned back into the natural channel, and such have been the extent and method of use by the Milling Company since the day of its appropriation. In effect, the Milling Company thereby gave notice to the public that its only use of this water was for power purposes, and, when that function was performed, its claims terminated; and such, indeed, is the only claim it now makes. After the water had again reached the natural channel, the plaintiff had the right to appropriate it directly from the stream, and such right is entitled to protection under the law. When the Milling Company ceased to use this water, the Water Company has no prior right over the plaintiff, for the latter first appropriated it. That the Water Company wanted to use it, or was prepared to use it if it could get it, but did not until after the plaintiff appropriated it, is no reason why the latter's rights should be subordinated to those of the former. Now, it is fur-

ther manifest that after the plaintiff made its appropriation, while the Milling Company may change the character of its use, or the place of diversion, it may not do so, to the injury of the former. Strickler *v.* Colorado Springs, 16 Colo. 61. Neither could it, by sale to the Water Company or other person, empower its grantee to do what it could not do. But, say counsel, plaintiff may not compel the Milling Company to divert water into its race for the former's benefit, and therefore the latter may cease altogether to use its mill race. True, but is this equivalent to holding that it may, by abandonment, confer, or that it may make such other use of its appropriation as to confer, upon others a right to deprive the plaintiff of its appropriation?

This leads to a consideration of the second general contention of defendants, that when the Milling Company ceases temporarily, or, as in case of abandonment, permanently, to exercise its rights, the water theretofore diverted must be allowed to flow in the stream, subject to appropriation by other appropriators higher up the stream in accordance with their relative priorities, irrespective of the question whether or not the unused or abandoned waters have been appropriated by ditch owners further down the stream before the date of such temporary or permanent nonuse. It is somewhat singular in this case that opposing counsel rely upon the same authorities, which are cited in all the briefs, though not so strange that they disagree in their conclusions drawn therefrom, or as to the legal effect of an abandonment. The position of defendants is that, when an abandonment occurs, the situation is as though no appropriation had ever been made, and, at the very moment an abandonment occurs, the water resumes its original quality of being a part of the public waters, and may be taken by other appropriators, in the order of their original dates of priority. It has been determined, where an appropriation of water for a use that wholly absorbs it, as for irrigation, is abandoned, and allowed to flow into the stream above the head gates of all the ditches, or when the stream, from whatever cause, has at such point received an increase in volume, the right to the use of the increased quantity is in accordance with the priorities of the several ditches. Kin. Irr. secs. 183, 259. We are not called upon to declare how abandoned water in all cases should be distributed, but we are to lay down the rule to govern in a case like the one at bar, and where the use is a non-absorbing one. So long as the Milling Company was using, and then discharging into the stream, the water whose benefits it had enjoyed, this returned water was, as to the Milling Company, abandoned water; that is, it had used it for a certain purpose, and thereafter made no further claim to it. But ditch owners above, owing to a physical law, could not then claim it. It then became subject to appropriation; and, when once it was appropriated by a ditch owner below the place of discharge, ditch

owners higher up the stream are not entitled to it, either during temporary nonuse or after abandonment, though their priorities as to other quantities of water or for other seasons of the year may be prior in time. The lower ditch owner, in other words, is himself the prior appropriator of this so-called "abandoned water." To hold otherwise would be to take away from a ditch owner below, who had made an actual bneficial use of water, something which he theretofore used, and give to another higher up the stream that something which the latter theretofore never had enjoyed, or had the opportunity or right to enjoy.

It follows, therefore, when the plaintiff went upon the stream, and saw the use that was being made of water by the Milling Company, and then made its appropriation, no subsequent act of omission or commission by the Milling Company could operate to the injury of the plaintiff; and, by virtue of its appropriation, the plaintiff, on the basis of then-existing conditions, secured a vested right to have the water continue to flow either from the mill race or from the stream itself, in substantially the same quantity as it flowed when its appropriation was made. The plaintiff, though junior to the Milling Company, in so far as the use of the water for power purposes is concerned, is a senior appropriator to the Milling Company as to the water which the former appropriated after it left the mill race. That right was just as valid as was the prior right of the Milling Company for power purposes, and each becomes a vested right. Lobdell *v.* Simpson, 2 Nev. 274; Ortman *v.* Dixon, 13 Cal. 33; Last Chance Min. Co. *v.* Bunker Hill & S. Mining & Concentrating Co., 49 Fed. 430; Kin. Irr. secs. 234, 253, 254, 259, and cases cited. This conclusion would seem to be in accordance with equity, and, in principle, well established by the authorities cited. The Water Company could not, by purchase, acquire from the Milling Company any superior right to this 60 cubic feet of water appropriated by the plaintiff, for the Milling Company had no prior rights to convey. Why, if the Milling Company ceases temporarily or permanently to use its appropriation, the Water Company could or should obtain a right which it could not get by purchase, is difficult to perceive, for one may not abandon a right in favor of another. An illustration used by plaintiff's counsel serves to bring out more clearly this point: Suppose the Water Company owned all the water rights, both for irrigation and milling, on this stream, and had used them for years, as the present owners have done. Could it, after the plaintiff had made its appropriation, change the character of the use of the mill appropriation, and use the same quantity of water during the winter season for storage in its reservoirs, and thus prevent plaintiff from enjoying its appropriation during the same season? Or could it change the place of diversion by discharging water from the mill race at a point below the plaintiff's head gate, in order to store

it in some reservoir that it might own farther down the stream? Manifestly not; and, if not, why should a different result follow by any act of the present owners, whether they act in conjunction, or entirely independent of each other? The judgment should be reversed, and the cause remanded, with instructions, if further proceedings be had, that they be in accordance with the views herein expressed. Reversed.[29]

DANNENBRINK ET AL. *v.* BURGER ET AL.

1913. CALIFORNIA. DISTRICT COURT OF APPEAL, THIRD DISTRICT

23 Cal. App. 587, 138 Pac. 751

HART, J.: This is a suit to quiet title to certain water rights and to enjoin the defendants from claiming or asserting any claim to said water rights and from interfering with the full enjoyment thereof by the plaintiffs. The defendants were awarded judgment on the issues made by their answer to the complaint. In due time the plaintiffs presented a motion for a new trial, which was denied, and this appeal is prosecuted by them from the order denying said motion.

The vital point upon which the decision of the controversy between the plaintiffs and the defendants must depend involves the question whether the latter were entitled to appropriate, and thus acquire the right to use the waters which it is claimed have for many years seeped or percolated through a certain ditch, owned by the plaintiffs and their predecessors for over thirty years immediately prior to the commencement of this action and whereby they utilized, principally for mining purposes, a large proportion of the waters of a stream known as Gwin gulch, in Trinity county. Said gulch is a mountain stream, and the quantity of water that it carries, like all ordinary mountain streams, varies according to the seasons of the year. In the winter time or the rainy season the flow of water in the gulch is large, while in the summer months or those months during which there is little, if any, rain, the flow of water naturally decreases, so that the stream contains or carries during such periods a very small amount of water. The plaintiffs claim the right, by appropriation, to take and use 1,200 inches of water from said gulch by means of three ditches, named and known as the "Waste Ditch," the "Eagle Ditch" and the "Empire Ditch."

* * * * * * *

[29] Cf.—Telluride *v.* Blair, 33 Colo. 353, 80 Pac. 1053, supra, p. 226; Cache La Poudre Reservoir Co. *v.* Water Supply & Storage Co., 27 Colo. 532, 62 Pac. 420; Windsor Reservoir and Canal Co. *v.* Lake Supply Ditch Co, 44 Colo. 214, 216-222, 98 Pac. 729, 731-733.

The evidence shows that the Waste ditch was constructed in the year 1863, and that during all the time since then the plaintiffs and their predecessors have continuously used said ditch, and by means thereof obtained a portion of the water from Gwin gulch owned by them and necessary for their purposes. The evidence further discloses that the Peek and Slack ditches, whereby the defendants and their predecessors in interest conveyed water from Gwin gulch to and upon their premises, were constructed at a later period; the last named ditch having been built in the year 1868, and the other at about the same time. It further appears from the evidence that, from the time that the Slack and Peek ditches were built and put to use, the dam and flume of the Waste ditch were in such condition as that a small proportion of the water taken into said ditch from Gwin gulch percolated or seeped through said flume and through and under said dam and again found its way to the channel of the gulch. It was this seepage water, with the drainage waters of the basin tributary to said Gwin gulch below the dam or intake at the head of said Waste ditch, which the defendants and their predecessors had appropriated and continuously used for their purposes for a period of about twenty-five years and until the year 1907. In the year just mentioned, the plaintiffs, as the evidence shows, removed the flume, tightened the ditch so that it would no longer admit of the loss by seepage of any of the waters taken into it, and installed a new dam, impermeable or water tight, in the place of the old dam, which was built in part of logs and loosely constructed, and which had for fully twenty-five years been maintained in connection with the said ditch. These changes in the dam and ditch resulted, of course, in preventing water from said ditch returning in any perceptible degree, to the gulch, and thus causing the defendants to be deprived of sufficient water from said stream to supply their needs. Although the plaintiffs claim that but an insignificant amount of water at any time returned from said ditch to the original stream in the summer time, they admit that, as to the extent of the leakage, the testimony is conflicting. And, in this connection, it may be stated that the plaintiffs contend that on occasions when more than a mere trace of water returned to the original stream from said ditch through leakage it was due to the punching of holes in the flume or dam by the defendants or their predecessors, and that but for such "punching process," as it is characterized by counsel for the plaintiffs, the quantity of water seeping from the Waste ditch and returning to the gulch would not at any time have been of any material consequence; but upon that question the evidence is also conflicting, and therefore the implied finding of the trial court adversely to the contention of the plaintiffs with respect thereto is binding upon this court.

We have not regarded it necessary to enter into a detailed statement and examination of the evidence in this opinion; it being sufficient, in our opinion, briefly to present, as we have in the foregoing statement, the important facts brought out at the trial and as

found by the court. It is conceived that the findings of the trial court that the defendants are entitled to certain waters of Gwin gulch, including those waters which have for many years percolated through and under the Waste ditch and dam, are well supported by the evidence. There remains therefore but one question to be determined by this court. This question is thus stated by the plaintiffs: "Whether or not a prior appropriator has, at any time, the right to tighten his dam, flumes and ditch so that there shall be no leakage therefrom"—the argument being that the evidence adduced at the trial of the present case goes no further than to show that the plaintiffs, in repairing their ditch and its appurtenances, performed an act which resulted only in the conservation of the amount of the waters of Gwin gulch originally appropriated by them and which are and were at all times necessary for their legitimate purposes.

But it is conceived that the question submitted here is much broader than as stated by counsel for the plaintiffs. It can not, of course, be questioned that an appropriator may at all times keep his ditch and its essential equipments in such repair as will preserve to him all the waters he has rightfully appropriated and which are required for the legitimate or beneficial purposes to which he applies them. The question presented for solution on this appeal, however, is not whether he may repair his ditches, flumes and dams or maintain them in proper condition for the purpose of conserving the full measure of water to which he is lawfully entitled by virtue of his appropriation, but whether, as a prior appropriator, he may so change or reconstruct his ditch, flumes and dam as to prevent waters seeping through his ditch from discharging into the original stream from which they were thus taken after such discharge of such waters has continued uninterruptedly for a period of time sufficient to establish a prescriptive title thereto in one who had actually appropriated and continuously used such seepage waters during all of such period of time? The question thus propounded must, upon sound and well-settled principles, be answered in the negative.

Section 1411 of the Civil Code provides that the appropriation of water must be for some useful or beneficial purpose, "and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." So, in this case, assuming that the plaintiffs and their predecessors had originally appropriated and used all the waters of Gwin gulch under their appropriation, it is clear from the findings that, by permitting a certain quantity of the waters so appropriated to seep through their ditch and return to the gulch, and therefore to remain unused by them, their right to such percolating waters ceased and became subject to appropriation by subsequent appropriators and the right of the latter to continue in the unmolested use of the same, provided that such waters were not recaptured or reclaimed by the plaintiffs within the period beyond which their right thereto would be barred for nonuser. It is a well-settled proposition that it is neither the capacity of the ditch nor the

amount originally appropriated which determines the rights of an appropriator of the waters of a stream, Smith *v.* Hawkins, 120 Cal. 86; Senior *v.* Anderson, 115 Cal. 496, and, as the first-mentioned of the cases just cited well says: "If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure. * * * No matter," continues the opinion in that case, "how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser." In other words, as is said in Duckworth *v.* Watsonville Water and Light Co., 150 Cal. 522, "an appropriator is entitled only to the water actually taken and used." And it may be observed that it is further said in that case that "a prior appropriator is not entitled to prevent * * * an appropriation or use by others of the surplus of the waters of the lake, if there is any," and this principle applies with equal propriety, we think, to waters seeping from a ditch and again returning either to the main stream itself or its tributaries, in which case, as is said by the Supreme Court of Colorado, in Water Supply and Storage Co. *v.* Larimer & Weld Reservoir Co., 25 Colo. 87, such waters "become a part of the waters of the stream the same as though never diverted, and inure to the benefit of appropriators in the order of their appropriation."

From the fact that the plaintiffs in the present case and their predecessors in interest suffered the seepages from their ditch to be discharged in the gulch continuously for twenty-five years prior to the time at which they repaired or reconstructed their ditch and dam in the year 1907, the conclusion is manifestly inevitable that the waters so returned to said stream were, during that period, not only not applied by them to a beneficial or useful purpose, but were not required or necessary for the purposes for which they appropriated waters from Gwin gulch. It follows that the waters so escaping from the Waste ditch and again returning to the stream from which they were diverted into said ditch became publici juris, and were therefore open to appropriation, diversion, and a beneficial use by others, and, having been appropriated and for about twenty-five years used and applied by the defendants to a beneficial purpose, they thus acquired a vested right or usufruct therein of which they can not now justly be divested by the plaintiffs. As before stated, a prior appropriator undoubtedly has the right to keep his ditches and their necessary concomitants in such repair as will enable them fully to perform or accomplish the legitimate purposes for which they were constructed, or he may change the point of diversion; but this rule is subject to the qualification that a subsequent appropriator has a vested right, as against his seniors, to require a continuance of the conditions existing at the time he made his appropriation, and if any changes made in the ditch by the senior, either

as to the place of diversion or otherwise, have the effect of altering those conditions, to the prejudice of a subsequent appropriator, the latter has just and legal cause to complain. See Handy Ditch Co. *v.* Louden Irr. Canal Co., 27 Colo. 515, and cases cited in said opinion.

The cases cited by counsel for the plaintiffs in an attempt to establish the proposition that waters escaping from the ditch of a prior appropriator and discharging into the stream from which they are so taken at a point below the place of such diversion may not be appropriated by others for a useful purpose, or that a usufruct therein can not be acquired by subsequent appropriators, are not applicable to the facts as found by the court in the case before us. We can not, nor is it necessary, specially to review all those authorities. It is deemed sufficient to say that they are cases which deal either with the question whether a person can acquire a vested right or usufruct in waters escaping from or seeping through the banks of an artificial water-course and discharging into another stream than that from which it is so diverted or going to waste, or with the question whether one may acquire a prescriptive title to riparian waters by adverse user or by estoppel by matters in pais under certain circumstances. As to the first of the propositions thus stated, and which involves the sole question submitted for decision in some of the cases referred to by the plaintiffs, it is to be remarked that it is well settled that, where water escaping or leaking from an artificial water-course goes to waste by flowing promiscuously over other lands or finds its way to some other stream than the one from which it is diverted into such artificial water-course, a person appropriating such water thus merely takes the corpus and not the usufruct therein. In such case, having the usufructuary right in such water, the owner of such ditch or artificial water-course is at liberty at any time to change or alter it without invading any vested right of the appropriator, even though the effect of such change or alteration must inevitably result in depriving the appropriator of the water escaping from such water-course and which he has appropriated and used, perhaps for a long period of time. As is said in Hanson *v.* McCue, 42 Cal. 303, 10 Am. Rep. 299, and approved in Katz *v.* Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. 35, the owner of an artificial water-course is not bound to maintain the artificial stream for the benefit of those who have appropriated waters escaping therefrom. And, as was said by Baron Parke, in Arkwright *v.* Gell, 5 Mees. and W. 226, wherein the right to the use of appropriated water pumped from a mine and run off in a ditch, "the lower claimant who received and put to use this water would only have a right to use it, for any purpose to which it was applicable, so long as it continued there. Time would raise no presumption of a grant nor found any claim to a continuance of the discharge; for the mine owner could not bring any action against the person using the water, so as to make him stop using it; and

consequently such use did not in any way concern or bind the mine owner. We, therefore, think that the plaintiffs never acquired any right to have the stream of water continued in its former channel." In other words, the appropriator merely secures the corpus of the water thus escaping as personalty, but does not thereby secure or acquire the right to the continuous flow of such water. This whole question is clearly and fully treated in Weil on Water Rights (3d ed.) secs. 51-63, inclusive, wherein the author makes a clear statement of the distinction which is recognized between the case of the discharge of seeping water from an artificial water-course into a place other than the stream from which it is diverted and the case of the return of such water to the stream itself from which the original diversion is made.

As to the cases cited by counsel, treating of riparian rights and the question of how such rights may or may not be divested by prescription or otherwise, it is to be said that, while some of them discuss many of the principles governing such rights and how they may be lost, in none of them is there anything which supports the proposition that a prior appropriator may so change his means of diversion as will have the effect of giving to him more water than he had theretofore habitually taken, where, by such change, he deprives a junior appropriator of a right which he has acquired in the waters of the stream. There is, however, no question of riparian rights involved in this controversy, and the cases last referred to shed little light on the question now before us.

Our conclusion is, as before stated, that the findings are sufficiently supported to render them immune from successful attack, and that the court's conclusions of law therefrom are sound. The defendants were awarded a very small proportion of the waters of Gwin gulch, and, as it is clear from the proofs that they have been and are using said waters for a necessary and beneficial purpose, viz., the irrigation of their vineyards, vegetable gardens, and land devoted by them to alfalfa growing, as well as for domestic or household purposes, we think the decree involves a just and equitable adjustment of the respective rights of the parties.

The order is affirmed.

We concur: Chipman, P. J.; Burnett, J.

BURKART ET AL. *v.* MEIBERG

1906. SUPREME COURT OF COLORADO

37 Colo. 187, 86 *Pac.* 98, 6 *L. R. A.* (*N. S.*) 1104, 119 *Am. St.* 279

CAMPBELL, J.: The plaintiff and defendant own adjoining tracts of land; that of the plaintiff lying to the west of the defendant's, the natural slope of which is in that direction. The defendants own valid water rights in several ditches which have their headgates in a natural stream, and with the water thus diverted they had for a number of years irrigated their tract of land in question. In the process of spreading water upon it, some of it, by surface drainage, has passed across, and escaped therefrom, and reached the land owned by the plaintiff, and is there collected by her, and by means of an irrigating ditch, running parallel with the common boundary line, she has used this water in raising crops. Plaintiff first began such use about the year 1890, and so continued until the year 1903, when the defendants dug a parallel ditch, entirely upon their own land, a short distance from the boundary line, and thus intercepted the water which had been spread upon their land further to the east, but which, in the process of irrigation, had not soaked into or passed beneath the surface, and the water thus intercepted by the defendants they carried by means of a ditch around the plaintiff's body of land, and irrigated other lands owned by them to the west of plaintiff's tract. The question for decision is whether the plaintiff has made a valid appropriation of waste water as against the defendants, or whether the defendants have a right, as against plaintiff, to intercept upon their own land, and before it passes therefrom, water which has been spread upon the same, but not entirely consumed, in the process of irrigation. It will be observed from the foregoing statement that it is only to such water as has actually escaped from defendants', and reached her own, lands that plaintiff makes claim. Her ditch is built entirely upon her own lands, and the point of diversion of the waste water is also situate thereon, and not on defendants' property. She does not claim water which, by seepage or percolation, first arises upon her own lands after having been applied to the irrigation of other lands; hence section 2269, Mills' Ann. Stat., does not apply.

It is manifest that, as against the defendants, the plaintiff has not made a valid appropriation of this alleged waste water. Just what constitutes waste water in every instance we do not decide, but it is unquestionably true that, so far as concerns the right to make a valid appropriation of it, this water is not waste water so long as it remains upon the lands of the defendants, and does not, in any event, become such until it has escaped and reached the lands of others. The plaintiff certainly has acquired no vested right to compel the de-

fendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into their own ground, but escape and pass from the surface on to her lands. The defendants have the right to change the place and manner of use, or reduce the quantity applied to their lands, so that no water whatever will escape and reach the lands of plaintiff. Whether the waste water which the plaintiff for a series of years has utilized has reached her land as a result of an improper or extravagant use which the defendants have made of their own appropriation, or whether it is the result of a proper method of irrigation due to the topography of the country, or some peculiar local condition, does not appear from the evidence, and is a matter of no material moment, so far as concerns the rights of the parties litigant. So long as, and while, the water which is applied by defendants to the irrigation of their lands remains upon the same, it is, as against the plaintiff, their exclusive property, whatever may be the rights of plaintiff as against some other claimant to it as waste water. Certainly, defendants could turn into their laterals from the main ditch, lying further to the east, less water than they have been wont to do, or apply it in such a way that all of it will sink into the ground before it reaches the boundary line of the two tracts; or they might turn into their laterals the full head to which they are entitled, and before it reaches, and is applied to, the portion of the land immediately adjoining plaintiff's, turn all or a portion of it into some other lateral or some other ditch, and use it upon an entirely different tract of land, and thus prevent a drop from running into plaintiff's ditch.

The plaintiff does not assert the right to the use of this water by virtue of an appropriation made from the same stream, or any of its tributaries, which are the source of defendants' supply. She can not, therefore, like a prior or junior appropriator of water from the same stream, insist upon an economical use by the defendants of their appropriation. If the defendants have no present or immediate need of the full quantity of water which they may divert and use, they can not waste it, but it is their duty to allow such portion as they have no immediate need for to remain in the natural stream, or, if diverted, to return such surplus again into the same stream, where, unless they then intend to recapture it, it becomes subject to diversion by the various ditches in accordance with their numerical priorities. La Jara Creamery, etc., Co. *v.* Hansen, 35 Colo. 105. After defendants' appropriation has done duty to their own land, they can not, even by grant, confer upon plaintiff the right to use it, or any of it, as against the superior claims of other appropriations from the same stream. By mere acquiescence on their part to plaintiff's use after waste water has passed from their lands they have not estopped themselves thereafter to intercept and make beneficial use of it before it escapes from their control. And if such further use may be restrained by another appropriator from the same source of supply, plaintiff can not assert any such equity.

The plaintiff makes the point, however, that before this action was begun the defendants had sold their adjoining tract of land, and consequently have lost their rights to any surplus or waste water that might be intercepted upon the same before it reaches the lands of plaintiff. If such sale was made, we do not see how plaintiff's position is thereby strengthened. Defendants did make a conditional sale of their land before suit was brought, but no conveyance thereof was made, and will not be until the conditions of the sale are fully performed by the vendee. With that the plaintiff has no concern. But if a sale and conveyance were so made, the rights of defendants' vendee to this surplus or waste water are paramount to the rights of plaintiff for the reasons hereinabove given, and the record shows that the interception and use of it by defendants upon another tract have been with their vendee's consent. Since, therefore, plaintiff has not, as against defendants, made a valid appropriation of this so-called waste water, or water which by surface drainage might, if not intercepted by them, reach her hands, but, on the contrary, as between the parties hereto, the superior right to its use when collected upon the lands of the defendants, and before it reaches her lands, belongs to them, the decree of the lower court awarding the prior right to the plaintiff can not stand.

No case has been called to our attention by counsel, and we have found none, in which the important question here discussed has been decided, but upon general principles we think the conclusion reached is sound. The case most nearly in point is Fairplay Hydraulic Mfg. Co. *v.* Weston, 29 Colo. 125. There the defendant mining company had acquired by appropriation the right to the use of water for placer mining purposes. Subsequently the plaintiff's grantor went upon the placer ground, and below the flume and dump of the placer mine constructed a ditch into which the water, after it had been fully utilized by the defendant for placer purposes and before it had reached the natural stream, was diverted and used by plaintiff and his grantors to irrigate agricultural lands. While the defendant acquiesced in this action of the plaintiff and his grantor, it did so with the understanding that they should not assert, as against the defendant, any legal right thereto, or in any way interfere with the operation of the placer. At a still later date the defendant turned a large volume of water into its ditch and so used it in placer mining that it fouled the water at the point where the plaintiff had diverted the flow for the purpose of irrigation. The court held that the plaintiff was not entitled to any relief as against this last act of defendant, because plaintiff and his grantor must be considered mere licensees, and acquired no such rights to the use of water as would authorize relief by injunction restraining defendant from polluting it. So far as that case has any bearing upon the present one, it is in favor of the defendants.

There is another and entirely distinct matter of dispute between the parties concerning the attempt by the plaintiff to use certain other waters through the Bloxin ditch. The decision of the trial court respecting it was in favor of the defendants, and our investigation leads us to believe that it was right. The decree of the lower court, therefore, should be reversed, and the cause remanded, with instructions to vacate so much of the former decree as bears on the rights of the parties to the so-called waste water, and to enter a new decree in favor of the defendants upon both points in controversy, and in accordance with the views expressed in this opinion.

Reversed.[80]

Gabbert, C. J., and Steele, J., concur.

FARMERS' UNION DITCH CO. ET AL. *v.* RIO GRANDE CANAL CO. ET AL.

1906. SUPREME COURT OF COLORADO

37 *Colo.* 512, 86 *Pac.* 1042

GABBERT, J.: A statutory adjudication of water rights for the purposes of irrigation was had in water district No. 20, by proceedings commenced in 1889 and concluded in 1891. In October,

[80] "Respondents seem to rest their case both as to Eight Mile and Quin river waters upon the contention that Hoppin's use was merely of waste water from the McConnell ranch, and rely upon Burkart *v.* Meiberg, 37 Colo. 187, 190, 86 Pac. 98, 99, 6 L. R. A. (N. S.) 1104, 1106, 119 Am. St. 279. But I do not think the doctrine of that case applies. * * * The court says:

" 'The plaintiff does not assert the right to the use of this water by virtue of an appropriation made from the same stream, or any of its tributaries, which are the source of defendants' supply. She can not, therefore, like a prior or junior appropriator of water from the same stream, insist upon an economical use by the defendants of their appropriation.'

"The case, therefore, is not in point for two reasons: First, that here the Hoppins, as we have seen, were the first appropriators, except to the limited extent above noted; and, second, that even if their appropriation was subsequent to that of McConnell, they had the right to insist that the unused water naturally flowing to them from the McConnell ranch should not be diverted elsewhere, but should be allowed to return to the stream to serve their appropriation. There is, strictly speaking, under the evidence, no waste water question in this case. If McConnell as an appropriator prior in right had diverted more than his fields should need, the excess thus diverted was not the subject of any rights resting in him, but was part of the water to which even a junior appropriator would be entitled. It was part of the water appropriated by Hoppin, and could not be diverted elsewhere by McConnell. It is immaterial, so far as respondents are concerned, whether or not Hoppin collected a part of it in a ditch intercepting it on its way to Eight Mile slough."—Van Fleet, J., in Anderson Land, &c. Co. *v.* McConnell, 188 Fed. 818, 829-830.

See Arkwright *v.* Gell, 5 Mees. and Wels. 203; Ball *v.* Kehl, 95 Cal. 606, 30 Pac. 780; Phelps *v.* Nowlen, 72 N. Y. 39, 28 Am. Rep. 93, post, p. 589.

1901, the Farmers' Union Ditch Company instituted proceedings for a further adjudication of rights in this district. The remaining appellants joined in these proceedings, to which appellees were made parties. From the final judgment rendered the parties claiming to be aggrieved thereby have brought the case to this court for review by appeal. The facts necessary to an understanding of the questions involved will be stated in connection with the propositions urged by the respective appellants.

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During the year 1892 a tunnel, called the Nelson, was driven into the mountain from a point on the west side of West Willow creek, a tributary of the Rio Grande river. A volume of water equivalent to something like nineteen cubic feet per second of time flows from this tunnel and finds its way into the river. The appellants, owners of what is termed the Nelson tunnel water right, complain of the judgment of the lower court because they were denied the right to the use of this water, although they had filed statements of claim thereon, and in pursuance thereof had diverted water from the stream. Their point of diversion is upwards of thirty miles below the point where the water from the tunnel finds its way into the river. They had no interest in the tunnel whatever, nor have they succeeded by purchase, or otherwise, to whatever rights the persons who drove this tunnel may have had in such water. It is claimed on their behalf that the water flowing from the tunnel was percolating, that it did not appear from the testimony that except for driving the tunnel it would ever have found its way to the river, and that it appears this water constitutes an actual increase to the natural volume of the river. None of these questions are material. The claimants expended no money or labor, in the way of driving the tunnel from which the water flows, nor have they purchased any rights which the persons driving the tunnel might have had therein. The water from the tunnel finds its way to the stream and has become a part thereof. It inures to the benefit of all taking water therefrom. In this particular water the claimants have no interest or right which will permit them to segregate a volume of water equal to that flowing from the tunnel, even if it be an actual increase, and assert an exclusive right thereto as against others diverting water from the stream. La Jara Creamery and Live Stock Association *v.* Hansen, 35 Colo. 105.

* * * * * * *

The judgment of the district court is affirmed.

Judgment affirmed.[31]

Goddard, J., not participating.

[31] "The fact that the Tuolumne Water Company at one time turned water from their ditch into Mormon creek, thereby increasing the volume of water, and the further fact that some strangers flumed the creek between the defendant's ditch and that of the plaintiffs, have, as we conceive, no direct bearing upon the rights of either party. If the water of the Tuolumne ditch

EDDY ET AL. *v.* SIMPSON ET AL.

1853. SUPREME COURT OF CALIFORNIA

3 *Cal.* 249, 58 *Am. Dec.* 408

WELLS, Justice, delivered the opinion of the court. Heydenfeldt, Justice, concurred.

From the record in this case, it appears that the plaintiffs constructed a dam across a stream called Shady creek to French corral, where the water was used by plaintiffs for mining purposes.

After the construction of plaintiffs' work, and plaintiffs had been for a considerable time in possession of and using the waters of Shady creek, the defendants constructed a work of a similar nature, whereby they brought water from Grizzly canyon and Bloody run, to a place known as Cherokee corral, where the water from defendants' ditch was used for mining purposes. The water thus used by defendants at Cherokee corral, from that point found its way by natural channels and by the natural level of the country, into the waters of Shady creek, above the dam of plaintiffs.

The defendants subsequently constructed a dam above the plaintiffs' dam, run a ditch to French corral, and diverted a portion of the waters of Shady creek, so that at times no water descended to plaintiffs' works, the entire quantity being used by defendants' ditch above.

The point made by the defence, on the trial of the cause below, was, that by the act of the defendants the waters of Grizzly canyon and Bloody run, were caused to flow into Shady creek; that, therefore, the defendants had a right to construct a dam and ditch above plaintiffs, and carry off the same quantity of water from Shady creek that flowed from defendants' ditch at Cherokee corral.

This defence is set up substantially in the answer of defendants, and the court below held, that defendants had an exclusive right to the water which they had caused to flow into Shady creek, and could withdraw the same. The instruction refused and the charge given by the court, both assume this right in the defendants.

was turned in without any intention of recapture, it became publici juris and inured as much to the benefit of the plaintiffs as the defendant. Their rights thereafter remained relatively the same as before, and were not differently affected than they would have been had the increase of water been due to some natural cause. So as to the fluming of the creek. If the effect was to decrease absorption and evaporation so that the creek thereafter would have delivered water at the plaintiff's ditch at seasons when otherwise it would not have done so, the increased facilities inured as much to the benefit of the plaintiffs as if they too had resulted from some natural cause instead of the agency of strangers."—Sanderson, J., in Davis *v.* Gale, 32 Cal. 26, 35-36, 91 Am. Dec. 554.

In considering the question presented, it is to be observed, that the foundation of the plaintiffs' right was their first possession. Of all the waters running into Shady creek, they were in the possession and use until defendants constructed their ditch above them, running to French corral. There is no pretence of right in the defendants to carry off water from Shady creek, except a claim of property in the water from Cherokee corral.

It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.

The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage. The right is not in the corpus of the water, and only continues with its possession. Angell on Water Courses, p. 86. A party can not reclaim water that he has lost. 2 Black. Com., p. 18. When the water of Grizzly canyon and Bloody run left the possession of the defendants at Cherokee corral, all right to, and interest in, that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.

As defendants had lost all right in the water, they could have no right to withdraw it from the possession of the plaintiffs. The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this state are embarked.

The judgment of the court below will be reversed, and the cause remanded for a new trial.[32]

BUTTE CANAL AND DITCH CO. *v.* VAUGHN

1858. SUPREME COURT OF CALIFORNIA

11 *Cal.* 143, 70 *Am. Dec.* 769

FIELD, J., delivered the opinion of the court—Terry, C. J., and Baldwin, J., concurring.

The plaintiffs' claim, under the first appropriators, the right to the waters of the south fork of Jackson creek, in the county of

[32] Colo. Stat. Ann., § 4231.—"That hereafter when any person or persons, or corporations, shall be engaged in mining or milling, and in the prosecution of such business shall hoist or raise water from mines or natural channels, and the same shall flow away from the premises of such persons

Amador, and previous to and at the time of the diversion by the defendants, which is the occasion of this suit, were the owners of a line of ditch and of flumes and aqueducts, into which, by means of a dam constructed across the stream, they diverted the waters from the natural channel of the fork, and conducted the same to adjacent mining ground to be used for mining purposes.

The defendants are the owners and in possession of valuable mining ground situated on the north side of the fork, and are endeavoring to obtain the requisite supply of water for its successful working from the north fork of the Mokelumne river and its tributaries, through the Amador county canal, under a contract with the owners of the canal. For that purpose the water is conducted from the canal by artificial channels to a natural gulch or ravine, from which it is emptied into the south fork of Jackson creek, above the dam of the plaintiffs. About a mile below the point where the water is thus emptied, the defendants have constructed a ditch leading to their mining ground, into which, by means of a dam at its head thrown across the fork, they divert a portion of the waters flowing in the channel, and it is this diversion which is the subject of complaint in this suit. The quantity of water diverted does not equal the quantity emptied into the fork from the Amador county canal through the ravine or gulch designated. Upon these facts the single question is presented whether the defendants, after the mingling of the water conducted by them from the canal with the waters naturally flowing in the fork, possess the right to take out an equal or less quantity from the stream, or is the right of the defendants to the use of the water whilst in the ravine, or to the use of an equal quantity, lost by its subsequent mingling with the natural waters of the fork?

This case is similar in its material features to that of Hoffman *v.* Stone, 7 Cal. 46. In that case the plaintiffs were the prior appropriators, and as such entitled to the waters of a stream called Dutch gulch, the channel of which was dry at certain seasons of the year. This channel the defendants used as a connecting link between two canals constructed by them, emptying their waters by one canal into the channel, and subsequently diverting them by means of a dam into the other. The plaintiffs in that case, who were the owners of a ditch which received its supply of water from the creek, obtained a judgment perpetually enjoining the defendants from diverting the water from the main channel so as to prevent it from flowing down to the extent of the capacity of their ditch. But on appeal the judgment was reversed, and this court, per Murray, C. J., said:

or corporations to any natural channel or gulch, the same shall be considered beyond the control of the party so hoisting or raising the same, and may be taken and used by other parties the same as that of natural water-courses."

"The plaintiffs being the prior locators, it would follow that any interference with the waters of Dutch gulch would be an infraction of their rights. But the appropriation of the waters did not give them the exclusive use of the bed of the stream. We see no reason why it might not be used by others as a channel for conducting water, so long as it did not interfere with their rights. If the defendants were diverting the natural water of the stream, as well as that brought into it by themselves, then the plaintiff would have a just cause of complaint."

In the case at the bar, the channel of the south fork of Jackson creek is used as a connecting link between the Amador county canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch. The principal difference between this case and that of Hoffman *v.* Stone, is the mingling of the water introduced by the defendants with the waters of the creek. In that case the channel of the stream was dry in certain seasons of the year, and at the time the suit was brought there was no natural water flowing in it. But it does not appear that this circumstance had any controlling influence upon the decision. The point settled in that case is this: that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If the plaintiffs in the present case receive their full supply, as previous to the introduction of water by the defendants, they have no cause of complaint.

It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity. Where there is a confusion of goods wilfully made by one owner, without the consent of the other, so that it becomes impossible to distinguish what belongs to each, the common law gives the entire property to the injured party. "But this rule," says Kent, "is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity, and not the whole." (2 Kent's Comm. 365; Lupton *v.* White, 15 Ves. 442.)

The plaintiffs rely, with apparent confidence, upon the case of Eddy *v.* Simpson, 3 Cal. 249. In that case the plaintiffs were the prior appropriators of the water of Shady creek, having diverted the same by a dam across the stream. The defendants, by like means, obtained the water of Bloody run and Grizzly canyon, which they

brought to a place known as Cherokee corral, where, after its use, it passed from their possession, and found its way, by natural channels and the natural level of the country, to Shady creek, at a point above the dam of the plaintiffs. And when the defendants undertook to retake from Shady creek a quantity of water equal to that which thus found its way into the channel, the court held their rights to the water were gone. "When the water of Grizzly canyon and Bloody run," said the court, "left the possession of the defendants at Cherokee corral, all right to and interest in that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady creek, joining the waters there in the possession of the plaintiffs, and became a part of the body of water used and possessed by them."

It is very evident that the court considered the fact that the water had passed from the possession of the defendants, and found its way to Shady creek without their agency, as material circumstances of the case; in other words, it regarded the water as having been abandoned. This is the view taken by Mr. Chief Justice Murray, when he notices the objection that Hoffman *v.* Stone was within the rule of that case; for the reason he assigns, as an answer to the objection, is the finding of the jury that the water was not abandoned by the defendants, and left to find its way by natural channels into Dutch gulch, but was turned in by the defendants, making the gulch a connecting link of their ditch.

There may be some difficulty in cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn—the quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects, because of the complicated and embarrassing character of the questions to which they give rise. If exact justice can not be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Cases involving questions of analogous character and equal difficulty are of frequent occurrence. The illustration given by the defendants' counsel is in point. A constructs a ditch, and appropriates a portion of the water of some stream for mining purposes; B subsequently constructs a ditch for a similar purpose, tapping the stream. A then enlarges his ditch, destroying the land-marks of its original capacity. A dispute then arises between A and B, as to whether A is not diverting more water through his enlarged ditch than he is entitled to by virtue of his first appropriation. Here the

quantity of water to which A and B are respectively entitled becomes difficult of accurate adjustment; and if, instead of two, there be a greater number of ditches taking water from the same stream, questions respecting the conflicting rights of the parties become exceedingly complicated and embarrassing. The courts do not, however, as we have observed, refuse to entertain such questions, but endeavor to relieve them of their complication and embarrassment, and to mete out justice to all parties. Priest *v.* Union Canal Company, 6 Cal. 107, and White *v.* Todd's Valley Water Company, 8 Cal. 443. In Embrey *v.* Owen, 4 Eng. L. & E. 470, Baron Alderson refers to a case in point. "There was a case," says the Baron, "of Dakin *v.* Cornish, tried before me at Leeds, in 1845, where water was taken from the River Ayr to work a steam-engine. There was an artificial course from the river to a reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth, the whole was then used for the steam-engine; what remained was transferred into another tube and carried back to the river; and the question was whether this was an injury to some other mills lower down on the stream. We took much care about the case, and I left it to the jury to say if the same quantity of water continued to run in the river as if none of its water had ever entered the premises of the defendant, and if so, he was entitled to their verdict."

The first appropriator of the water of a stream passing through the public lands in this state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint.

It follows that the court below erred in sustaining the demurrer to the new matter set up in the answer, and the judgment rendered thereon must be reversed, and the cause remanded for further proceedings. Ordered accordingly.

KELLY ET AL. *v.* THE NATOMA WATER CO.

1856. SUPREME COURT OF CALIFORNIA

6 *Cal.* 105

The defendants, the Natoma Water and Mining Co., commenced a canal, in 1852, to conduct water from a point on the south fork of the American river, about twenty miles above Alder creek, to

supply the miners above and below that creek. In September, 1853, they purchased a dam, constructed a few months prior, on Alder creek, and turned their water into the bed of the creek, above the dam. They had flumes, conducting the water from the dam to points lower down. In Alder creek there is no running water from natural sources, except in times of freshet, though there are pools of water a part of the year. The defendants also built another dam for the same purpose, and constructed canals to conduct the water to miners lower down. The defendants had used natural water-courses, wherever practicable, down to this point, along the route of their works, and took up the water sold by them, after it was used, and conducted it by canals to lower points of their works, and re-sold it. There was an escape of water from the lower dam of defendants, and the plaintiffs subsequently, and in the month of October, 1853, built a dam, half a mile below that of defendants, and used the water thus escaping from defendants' dam. Prior to this, the defendants had charged certain Chinamen for the use of the escape-water; and at the time plaintiffs commenced their dam, the defendants notified them that they should charge for the water, and had not abandoned it, and that they intended to erect other dams to collect it; but the defendants had not actually appropriated the bed of the creek below their dam. About May 1, 1854, the defendants erected another dam, about one hundred yards above the plaintiffs' dam, thereby cutting off the water used by plaintiffs. The plaintiffs brought their action for damages, and to restrain defendants. The case was tried by the court, who awarded the plaintiffs damages to the amount of $648, being the value of the water cut off from plaintiffs, and entered a decree that defendants' last-erected dam be removed and abated. Defendants moved for a new trial, which was denied, and defendants appealed.

* * * * * * *

The opinion of the court was delivered by Mr. Justice Heydenfeldt. Mr. Chief Justice Murray and Mr. Justice Terry concurred.

Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows.

Such appropriation can not be constructive, because there would be no rule to limit or control it, resting, as it must, only in intention. The principle, as laid down in Eddy *v.* Simpson, 3 Cal. 249, must govern this case.

The design of the defendants, two years before, to appropriate Alder creek as a connecting link of their enterprise, could not give them exclusive rights until it was executed, because it is not the intention to possess, but the actual possession, which gives the right. And so in the case of Stark *v.* Barnes, 4 Cal. 412, cited by appellants, the doctrine of relation, as between the acts of the plaintiff, first and last, was simply applied to the thing possessed, and not to the intention of possessing.

The purchase by the defendants, of Walker's dam, was an actual appropriation of the waters of the creek so far, but no further; and until they built a dam below, in order to make a further appropriation, any one else had the right to do so. If they had commenced first to build the dam in good faith, then, although their power of enjoyment would not commence until its completion, yet the right, as against others, would bear relation to the time of commencement; and this is all that the principle in Stark *v.* Barnes amounts to.

Judgment affirmed.

SCHULZ *v.* SWEENY

1886. SUPREME COURT OF NEVADA

19 *Nev.* 359, 11 *Pac.* 253, 3 *Am. St.* 888

BELKNAP, C. J.: Defendant, by means of a dam and ditch constructed above the lands of the plaintiff, diverted therefrom the waters of Lake View canyon. These waters are produced by rains and melting snows, and, collecting in a channel, are increased by subterranean currents cut by tunnels driven into the mountains for that purpose. The body of water thus formed finds its way during a portion of the irrigating season by the channel, and through the depressions of Eagle valley, first to the lands of the plaintiff, and afterwards to the lands of the defendant. At times during the summer months the volume of water is materially increased by the water of a wood flume operated by a corporation known as the Sierra Nevada Wood and Lumber Company. The water of the flume forms a part of that appropriated by the Virginia and Gold Hill Water Company, also a corporation, organized for the purpose of supplying the inhabitants of the towns of Virginia and Gold Hill with water for domestic and other purposes. This company acquires the control of a supply of water in the Sierra Nevada mountains, presumably by reservoirs, acqueducts, and such other appliances as are employed by companies having a similar purpose. A portion of this water is conducted into the flume of the wood company for the purpose of carrying wood from the mountains to the terminus of the flume at the head of Lake View canyon. The water, after being thus used, is incapable of being conveyed by pipes to the localities where the water company is engaged in furnishing water, and it is therefore discharged. The point of discharge is upon a mountainous ridge dividing Eagle valley from Washoe valley. Water discharged at this point, following the natural depression of the mountain, would find its way to Washoe valley. The water may also be directed to Eagle valley by means of a ditch leading from the flume to the canyon, and, when so directed, falls into the channel.

Through the agency of the water company the discharged water has been sent, some years to one of these valleys, other years to the other valley, and again to both valleys. During the month of July, 1885, and before the commencement of this action, the water company, for a valuable consideration, leased to the defendant the water that should be discharged at the mouth of the flume during the remainder of the year. The district court decided that defendant acquired no rights by reason of the lease, and a decree based upon this conclusion was accordingly entered. In support of the decree it is said that if the right to dispose of the flume waters rested anywhere, it was in the flume company, and not in the water company; but that, in any event, nothing passed by the lease, because the waters were abandoned.

In the view we take of this case, we deem it immaterial to inquire where the right of disposition rested. The water was discharged from the flume for the purpose of getting rid of it, and left to find its way to the natural level of the country, through the lands of others, without intention to reclaim or enjoy it. Neither company undertook to exercise any control over the water after it was discharged, save to direct it to one valley or the other, and so as to do no injury to settlers along its course. These facts are conclusive evidence of an abandonment. The effect of turning the waters into the channel was to make them a part of the stream, and subject to the same rights as the water naturally flowing therein. This principle will be shown by reference to authorities. In Goddard's Law of Easements, at page 51, it is thus stated: "Where a stream is natural, there can be no doubt that all waters which flow into it become a part of that stream, and subject to the same natural rights as the rest of the water, and that it makes no difference that the water so flowing to the natural stream was sent down by artificial means."

In Wood *v.* Waud, 3 Exch. 779, the effect of mingling the waters of an artificial drain with those of a natural stream was considered. The court said: "Have the plaintiffs a right to the waters of this slough, as described in the third count of the declaration?" It appears to us to be clear that as they have a right to the use of the Bowling Beck, as incident to their property on the banks and bed of it, they have the right to all the water which actually formed part of that stream as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works; and if the proprietors of the drained lands, or of the colliery, augmented the stream by pouring water into it, and so gave it to the stream, it would become a part of the current. No distinction could then be made between the original natural stream and such accessions to it." See, also, Washb. Easem. 274; Ang. Water Courses, sec. 95; Eddy *v.* Simpson, 3 Cal. 249.

In behalf of appellant it is claimed that the use of the channel for the purpose of conducting the water to the defendant's dam was not an abandonment of the water. Hoffman *v.* Stone, 7 Cal. 47, and Butte Canal Co. *v.* Vaughn, 11 Cal 143, decide that it is not an abandonment of artificial waters to mingle them with the water of a natural water-course for the purpose of conducting them to the point where they are to be used. In such cases the prior appropriator can not complain of the use made of the bed of the stream, so long as the party conducting the water does not divert more than he has added to the stream. But these cases are plainly distinguishable from the one at bar. In them the water was turned into the stream for the purpose of diverting a like quantity at a point further down, —this was the end to be accomplished; while here the water was discharged into the stream as a matter of convenience, and without intention of recapturing it.

Exceptions were taken to the failure of the court to ascertain, by its findings of fact, the extent of defendant's appropriation of the water. The decree provides that the water of the channel shall pass over the lands of the plaintiff before any right to its use by defendant shall attach. In this respect it is technically erroneous. Defendant, as an appropriator of the water, should have the right to divert it to the extent of his appropriation, either above or below the lands of the plaintiff. The decree should have ascertained the amount of water to which he was entitled, and recognized this right. But the point at which the water might be diverted does not appear to have been a question at the trial. It was not shown that defendant could not divert the water as advantageously below the land of the plaintiff as above it. No pretense is made that by reason of this provision of the decree defendant is in anywise prejudiced in the use of the water. The diversion above the land of plaintiff by means of the dam and ditch was not because that was a more beneficial way of using the water, but was for the purpose of preventing the use of the flume water by the plaintiff.

The error works no injury to the defendant, and does not authorize a reversal.

Judgment and decree affirmed.

MILLER ET AL. *v.* WHEELER ET AL.

1909. SUPREME COURT OF WASHINGTON

54 *Wash.* 429, 103 *Pac.* 641, 23 *L. R. A.* (*N. S.*) 1065

CHADWICK, J.: In 1874 Philip Miller settled upon a tract of land now in Chelan county, Wash. At the time a prior settler, whose improvements he bought, had appropriated and diverted about 100

miner's inches of water then flowing in the Quil-toc-chin, latterly called the Squillchuck, a small stream flowing out of the mountains, across the Wenatchee valley and into the Columbia river. Thereafter, before the intervention of other rights, he dug a larger ditch, and appropriated and put to beneficial use 320 miner's inches measured under six-inch pressure. In the summer of 1885 Peter Wheeler and Fletcher Byrd settled on what is now known as "Wheeler Hill"; their lands lying above the point of Miller's headgate and distant about a quarter of a mile from the Squillchuck. On the Wheeler land there were two small springs, and on the Byrd land there was a larger spring. These springs were so located that they furnished no water for irrigation for the owners of the land upon which they arose. The Wheeler and Byrd land, or a part of it, formed a natural basin culminating in a narrow gulch descending rapidly into the Squillchuck, and in the springtime, as the snow was melting, water flowed from this drainage basin into the gulch and down into the Squillchuck. The testimony is in sharp conflict as to the amount of water flowing from the springs at the time Wheeler and Byrd made settlement; the witnesses for plaintiffs fixing the flow from them at from four or five inches to eight or ten inches in the summer season, while the witnesses for defendants insist that no water whatever, other than the flood waters of spring, flowed from the springs into the Squillchuck. In the year 1897 Wheeler, Byrd, and others went above their lands and onto another watershed, and appropriated the waters of Stemilt creek, which they brought over and used for irrigating their lands. From this time the flow of the springs gradually increased, and marshes of considerable extent formed on the lands, an acre or two on both the Wheeler land and the Byrd place. The marshes formed by the excess waters from the Stemilt were, like the springs, so situate that neither owner could collect the waters there accumulating and put them to a beneficial use on his own land. About the year 1894 it was agreed between Wheeler and Byrd that Byrd might lay a ditch so as to drain the excess waters on the Wheeler lands and divert the water to his land adjoining for the purpose of irrigation, and in that consideration therefor Wheeler might have the flow of the Byrd spring and seepage from the marsh after it had passed down the gulch, into the Squillchuck, and on past the Miller headgates for use on lands owned by him lower down in the valley. In the year 1901, C. E. Morse bought the land and water right of Fletcher Byrd. That Wheeler and his grantees used water out of the Squillchuck, sold land, and conveyed water rights, from 1895 up to 1906, seems not to be denied. In July, 1906, however, the flow at Miller's headgate being less than 320 inches, he brought this action to restrain defendants from all acts and uses of the water that tended to decrease his flow below the amount to which he was entitled under his original appropriation. The gist of the complaint is contained in the following excerpt from the pleadings: "That since about the 1st day

of July, 1906, the quantity of water flowing in said stream and coming down to the headgate of said ditch, which is located in section 22, township 21, range 20 E. W. M., and has been so located since the year 1870, has been less than said 320 inches, since which time the defendants have taken and diverted, and are continuing to take and divert, from said stream, above said headgate, about twenty inches of water, miner's measure, under a six-inch pressure, and have prevented its returning to said stream, and have wrongfully deprived the plaintiffs thereof, said water so taken and diverted being water arising from springs located upon or near section 3, township 21, range 20 E. W. M., which are and were, at the time plaintiffs' right to take said waters became vested, feeders of said main stream and a part of plaintiffs' said water."

There is no evidence whatever tending to show that any diversion of water has been made by any of the appellants from the Squillchuck itself above Miller's headgate. Hence we conclude that the diversion complained of is the digging of the ditch which drained the marsh and spring on the Wheeler land, with the incidental right claimed by the Wheelers and their grantors to divert the overflow of the Byrd spring and marsh, after it had followed the natural path of gravitation into the Squillchuck. Confusion may be the worse confounded, however, for appellants say in their brief that respondents are seeking to restrain a diversion below the Miller headgate. No findings of fact were made by the trial court; but we think the evidence shows that the greater part of the water now flowing down the gulch into the Squillchuck from Wheeler Hill is due to the seepage from the Stemilt waters which have been turned on the lands of appellants. The question naturally occurs whether the water from this artificial source, having naturally gravitated into the soil and percolating therein, may be ditched and drained for further use by the owners as against the right of a lower appropriator; in other words, whether percolating waters arising from an artificial source become a natural flow of an existing watershed and a part of its drainage stream. Our conclusion is that it may be or may not be so, according to the facts presented in the particular case under consideration. The Stemilt waters being the result of the landowners' energy and effort, it would seem but just to say that, so long as he used them or could impound the overflow or waste upon his own land, although for use on other land, one asserting a right of appropriation in no way dependent upon the artificial flow, but made without reference to it, should have no cause to complain. The doctrine of appropriation rests upon the theory of ownership, and, while cases going to the particular question here presented are not numerous, there are nevertheless some that in principle sustain the premises which we have laid down.

In Farnham on Waters, sec. 672d, the rule is stated thus: "When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream

at the time the appropriation is made, and he has no interest in the improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there." If this be the rule applying to waters of the stream actually appropriated, the conclusion is inevitable that it would apply with greater force to a supply of water brought from an entirely different source and from another watershed.

We find the principle underlying the rule quoted in Burnett *v.* Whitesides, 15 Cal. 35, where the rights of the first appropriator were limited to the natural waters of the stream. In Platte Valley Irrigating Company *v.* Buckers Co., 25 Colo. 77, it was held that one who had increased the average continuous flow of a stream by his own energy and expenditure was entitled to such increase, but would not be entitled to the original flow as against the senior appropriator. In Herriman Irrigation Company *v.* Butterfield Mining Company, 19 Utah 453, 51 L. R. A. 930, the court, acknowledging the principle of ownership in waters developed in excess of the natural flow, says: "* * * We are clearly of the opinion that the defendant company did not acquire a right to any of the water flowing from said tunnels except such as was developed by percolation, and that the plaintiff retains the right to all the water flowing in the natural channel of Butterfield creek, diminished only to the extent of the increase of the quantity of water which naturally flowed in the channel of Butterfield creek before said tunnels were run and said springs were dried up." While the waters of Stemilt creek, when discharged upon the Wheeler and Morse lands, and after their use for irrigation, did not become percolating waters in the full sense—for, as we understand the term, it rests upon the theory of unknown source—the rights to it while still upon the lands of the owners can be sustained by the same reasoning which under the common law gave a land owner a right to impound for his own use the water percolating through his own soil. To take it was ever held to be *damnum absque injuria* to another, for it was a component part of the soil. This proposition is too well established to require the citation of authority.

Ownership implies responsibility. If our reasoning requires further support, the fact that the appellants, Wheeler and Morse, because of the artificial augmentation of the natural flow of the Squillchuck, would be held liable for all damage done to the lower appropriators from flooding their lands, injuring the banks of the stream, or washing out their improvements, needs only to be mentioned to meet approval. Respondents' rights must be measured by the con-

dition of the stream at the time of Miller's appropriation in 1874. If his appropriation was subsequent to the development of the Stemilt water, an entirely different question would be presented. If the natural flow of the Squillchuck increases, it is gain; if diminished from natural causes, it is his loss. He has no interest in an increased flow arising from an independent source, unless abandoned by its owner. Upon the principle that the law of appropriation as applied to the arid regions will not tolerate a waste of water, it has been held that water that is allowed to run to waste after use on the land of the appropriator is abandoned, and that lower appropriators are entitled to the surplus. Farnham on Waters, 694; Power *v.* Switzer, 21 Mont. 523; Roeder *v.* Stein, 23 Nev. 92; Barrows *v.* Fox, 98 Cal. 63. But abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region. Farnham on Waters, 691. In the instant case, when the marshes developed upon the lands of Wheeler and Morse, but at the place where the waters therein could not be used by the respective owners on their own lands, there is evidence showing that Wheeler agreed that Byrd might drain the surplus on his land in consideration of the use of the surplus flowing from the Byrd land, through the natural waterways, including the Squillchuck, upon his land down in the valley and below respondents' headgate. This contract was in itself a circumstance tending to show that it was not the intention of the parties who had developed a supply of water and carried it over from the Stemilt to abandon its use; but the fact that the water was actually so used for a beneficial purpose for a period of eleven years, and made the subject of conveyance, seems to us conclusive upon this feature of the case. The fact that the surplus is allowed to run into a natural waterway to which rights of appropriation have attached is a circumstance to be considered, but does not shift the burden of proving an abandonment from respondents. Hall *v.* Lincoln, 10 Colo. App. 360.

Respondents invoke the general rule that waters draining into and augmenting the natural flow of the stream and its tributaries become a part of the natural flow of the stream, and hence the property of the prior appropriator. This raises the question whether the bed of the tributary gulch and the Squillchuck itself can be used as a ditch to convey the surplus Stemilt waters from Wheeler Hill to the Wheeler lands below the Miller head gate. The law of appropriation is the creature of necessity. It is a growth peculiar to conditions unknown to the common law. It has followed custom, rather than fixed conditions, and it was held in the earlier case of Hoffman *v.* Stone, 7 Cal. 46, that the immense cost and waste involved in con-

veying water to its place of use justified the owner in taking advantage of the natural beds and channels of streams when it could be done without injury to the rights of others. In that case the court said: "It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or canyon." This rule was extended in the case of Butte, etc., Co. *v.* Vaughn, 11 Cal. 143, 70 Am. Dec. 769, wherein Mr. Justice Field, who has so ably and clearly differentiated the law of appropriation from the rules of the common law, said: "It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity." This doctrine is affirmed in the following cases: Parks Canal, etc., Co. *v.* Hoyt, 57 Cal. 44; Creighton *v.* Kaweah Irrigation Co., 67 Cal. 221; Paige *v.* Rocky Ford Canal, etc., Co., 83 Cal. 84; Malad Valley Irrigating Co. *v.* Campbell, 2 Idaho (Hasb.) 411; Herriman Irrigation Co. *v.* Butterfield Mining Co., 19 Utah 453, 51 L. R. A. 930; Platte Valley Irrigating Co. *v.* Buckers Co., 25 Colo. 77; Simmons *v.* Winters, 21 Ore. 35, 28 Am. St. 727; Kinney on Irrigation, sec. 246.

Appellants also rely upon section 4114, 1 Ballinger's Ann. Codes & Stats. (Pierce's Code, sec. 5829), which provides that the person upon whose lands the seepage or spring water first rises shall have a prior right to such waters if capable of being used upon his lands. A review of the authorities will show that a clear distinction is drawn between springs rising or seeping upon lands and from which there is no outlet, and springs which form the fountain heads of living watercourses. The court below has found (otherwise its decree could not be sustained) that there was a living flow from these springs. They thus became a part of the Squillchuck waters, and therefore subject to appropriation. This court has said that if the statute were given any other effect it would be held unconstitutional. Neilson *v.* Sponer, 46 Wash. 14, 123 Am. St. 910.

Nor do we think that any right can be predicated by the Wheelers and their grantees to use water on the valley lands by reliance upon the statute of limitations or rights acquired by prescription. Rights in water come from adverse use, rather than a permissive use, and, so long as there was an excess of water flowing past the Miller headgate, no right could accrue to the users of that surplus. It must not be inferred from what has been said that the rights of appellants are not without some qualifications, as will be seen from a perusal of the authorities cited. Having decided that appellants did not intend to, and did not in fact, abandon the Stemilt water impounded on or flowing off of their lands on Wheeler hill, but that it was allowed to

flow with intent to recapture it at a point below, it follows that its identity must be preserved. Identity in this particular is made possible by measurement. They can take no more out than they put in, making due allowance for natural waste and loss by evaporation. Burnett *v.* Whitesides, 15 Cal. 35; Wilcox *v.* Hausch, 64 Cal. 461.

Another limitation, as will be noted in the authorities, is that in reclaiming their own they can not cut off nor dry up any of the original sources and springs tributary to the Squillchuck, the waters of which have been appropriated by respondents and the perennial flow of which they are entitled to. The testimony shows that there was a perennial flow of water from the springs on Wheeler hill. The evidence as to the amount of this flow is so conflicting that we can not definitely fix it.

Having decided that there was some flow, that this was increased by the energy and expenditure of appellants, and that the increase was not abandoned, the case will be remanded to the lower court to find the amount of the original flow from the springs on Wheeler hill, the amount this flow has been increased by artificial means, and the amount of depreciation from natural waste and evaporation of the added flow in passing from Wheeler hill to the Miller headgate; and that it then decree that the amount so found be allowed to pass the headgate for use on the lands of Wheeler and his grantees in the valley below. To accomplish this end the trial court may take such additional testimony as may be necessary.[38]

Rudkin, C. J., and Fullerton, Gose and Morris, JJ., concur.

Section 2.—Method of Initiating Appropriation Rights

KIMBALL *v.* GEARHART

1859. SUPREME COURT OF CALIFORNIA

12 Cal. 27

This was an action for damages for the diversion of water from the ditch of plaintiff.

The facts are stated in the opinion of the court, with the exception of certain instructions which were given by the court to the jury. The instructions given by the court, at the request of the plaintiff, are as follows:

[38] See Wiggins *v.* Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. 337; Pomona Land & Water Co. *v.* San Antonio Water Co., 152 Cal. 618, 93 Pac. 881; Churchill *v.* Rose, 136 Cal. 576, 69 Pac. 416; Comstock *v.* Ramsay, 55 Colo. 244, 133 Pac. 1107, post, p. 679; Roberts *v.* Gribble, 43 Utah 411, 134 Pac. 1014, post, p. 687; Paige *v.* Rocky Ford Canal and Irrigation Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Rem. and Ball. Ann. Codes & Stat. of Wash., § 6337; Colo. Stat. Ann., §§ 3222-3225; Wiel, Water Rights in the Western States (3d ed.), § 40.

"1. If the jury believe that the plaintiffs did, in July, 1854, project a ditch to receive the water now in dispute, and did give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and did mark out and designate the line of said ditch by the usual marks and indications, and did pursue their work on said ditch with a reasonable degree of diligence until the same was completed so as to receive this water in dispute, then they are entitled to such water before all persons subsequently claiming or locating it.

"2. If the jury believe, from the evidence and the admissions contained in the answer, that the plaintiffs took up and claimed the water in dispute before the defendants did, and that they constructed a ditch to receive such water, with due diligence, and that since the completion of said ditch they have been deprived of such water by the defendants, and since the 31st of July, 1856, the plaintiffs have had their ditch in a condition to, and could have used the water in the water season prior to the commencement of this suit, and have, during such time, been deprived of the use thereof by the defendants, then they must find for the plaintiffs and assess the damages.

"3. In appropriating unclaimed water on public lands, only such acts are necessary, and only such indications and evidences of appropriation are required, as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable; and surveys, notices, stakes and blazing of trees, followed by work and actual labor, without any abandonment, will in every case, where the work is completed, give title to water over subsequent claimants.

"4 If the plaintiffs surveyed the ground, planted stakes along the line, gave public notice by posting notices, or otherwise, and actually commenced and diligently pursued the work of the Yuba river ditch, which was to take and receive the water in dispute, and if any of these acts were prior to the claim or location of defendants, this entitled plaintiffs to the possession and ownership of the water, and therefore the jury must find for plaintiffs.

"5. If the jury believe that the plaintiffs, with the intention to appropriate this water, used reasonable diligence in following one step by another till the ditch was completed, their title to the water, though it was not perfected until the ditch was so far completed as to convey the water, will yet, on completion, date from the beginning of the work.

"6. That in determining the question of the plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases.

"7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due dili-

gence to complete their ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

To the giving of the foregoing instructions, the defendant excepted.

The following are the instructions given at the request of the defendant:

"1. If the jury believe from the evidence that the plaintiffs had no ditch or survey for a ditch to the stream of water in dispute, and also that they had no notice or marks upon said stream, indicating an intention to appropriate it, at the time of defendants' appropriation of the water of the said stream, they must find for the defendants.

"2. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are dependent upon the ownership of the land through which the water flows.

"3. The mere act of commencing a ditch with the intention of appropriating the water of a stream, is not sufficient of itself to give a party any exclusive right to the water of such stream.

"4. Although plaintiffs or their grantors may have intended to appropriate the water in dispute, by means of their ditch commenced in 1854, yet, if they did not manifest their intention by such acts or in such a manner as would have notified a prudent man, about to appropriate said water, of such intention at the time defendants appropriated the same, the jury must find for the defendants.

"5. The doctrine of relation in the appropriation of water, can only apply when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water.

"6. If the jury believed from the evidence, that plaintiffs or their predecessors in interest, did not, after locating and surveying their ditch, prosecute the work on it in good faith, and as fast as the nature of the work and the state of the weather would reasonably permit, and that they had neglected the work upon it for an unreasonable length of time, immediately preceding the appropriation of the water in dispute by defendants, the verdict should be for the defendants.

"7. If the jury believe from the evidence that the plaintiffs at the time they commenced the Yuba river ditch, had not the pecuniary means requisite to complete the same in a reasonable time, and that they projected the said work, and claimed the water in dispute with a full knowledge of their said pecuniary inability to complete the same within a reasonable time, then plaintiffs can not urge such want of pecuniary means as an excuse for not prosecuting said work with reasonable diligence, and completing it within a reasonable time.

"8. If the jury believe from the evidence, that the plaintiffs made an unreasonable delay after claiming the water in dispute, and that during such delay, and before the plaintiffs renewed work upon their ditch, defendants in good faith located and appropriated the water in dispute, they must find for the defendants.

"9. If the jury believe from the evidence, that the defendants were the first appropriators of the water in dispute, in good faith, and without notice of any prior claim of plaintiffs, they must find for defendants.

"10. Even if the plaintiffs had located and claimed the water in dispute, in the year 1854, and prior to the appropriation of the same by the defendants, yet, if after making such location and claim, plaintiffs failed and neglected to renew or keep in existence such notice or such other evidence of their location and claim, as would have put a reasonable and prudent man, wishing to appropriate the water, on inquiry, and that in the absence of such notices or other evidences of said location or claim, the defendants located and appropriated said water in good faith for mining purposes, they must find for the defendants.

"11. Kimball and others are plaintiffs in this action, and they must show a better title to the water in dispute than the defendants have, before they can recover, and the burden of proof is on the plaintiffs to show that they are entitled to the water in dispute."

To the giving of which instructions so requested by the defendants, the plaintiffs excepted. The substance of the instructions refused by the court, appear in the opinion of the court. Defendants had verdict and judgment.

Plaintiffs moved for a new trial, which was denied, and they appealed to this court.

* * * * * * *

BALDWIN, J., delivered the opinion of the court—TERRY, C. J., concurring.

* * * * * * *

The main question was as to the priority of location of this ditch, and this depended very much upon the general fact whether the plaintiffs had done such acts in 1854 as would, in August, 1855, when they completed their ditch to the water in dispute, entitle them to invoke the doctrine of relation, and get in, in advance of the actual appropriation of the water by the defendants; and upon this question there was no little conflict in the proofs. The conflict is in respect to the dates and character of the particular acts from which the appropriation is inferred. If there were no other circumstances of conflict than those contained in the testimony of James as to the time of marking the trees, this would, perhaps, be sufficient to be left to the jury for them to determine the weight and effect of the proofs. But there are various other matters of more or less weight, such as the admissions of Howe and the like.

The points made by the appellants question the propriety of certain instructions given and of the refusal of other instructions asked.

A large number of instructions were given by the court, and several refused. Those given are expressed with great clearness and precision. They embody the law as ruled by this court, and propositions necessarily resulting from those settled heretofore. Several instructions were refused by the court. They are marked seven, eight and nine of the list of those asked for by the plaintiffs. The seventh instruction was to this effect: That if the plaintiffs did, in the summer of 1854, acquire a right to the water in dispute, then the law presumes they retained the right so by them acquired, and the burden of proving an abandonment on their part is with the defendants. This was refused, because there was no testimony showing that in 1854 the plaintiffs had acquired any such right. The instruction, as it stood, was at least ambiguous, and calculated to mislead. The right of the water did not, in strictness, accrue until the completion of the ditch—though the initiatory steps in 1854 might, by force of the subsequent event, have given title as against a subsequent appropriation from 1854, if done in that year. But this general language, though proper in some sense, was calculated to convey a wrong impression, as the jury might have inferred that these acts, of themselves, gave a right to the water. When the court gave its reason for withholding the instruction, the appellants, if they desired the charge as to the abandonment to be given to the jury—for the court had fully instructed the jury as to the other portions asked—should have removed this objection to it. Indeed, it is not clear that the whole substance of the legal portion of this charge had not already been given.

The eighth and ninth instructions are, in substance, that the jury should not regard any proof offered of abandonment, inasmuch as no such defense as abandonment is specifically set up in the answer. The complaint is general, not setting forth the character of title, or the facts constituting the title of plaintiff. It avers, in general terms, that "on or about the month of July, 1854, the said plaintiffs and their predecessors claimed, located, appropriated and became the owners of, and became entitled to the possession, use and enjoyment of, for mining purposes, the water and waters flowing," etc. The answer denies this general averment. Thus is put in issue the very question of title, and this involves necessarily the due prosecution of the work after the appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title, and the negation of this, the abandoning of the purpose, is not so much matter in avoidance of a title, as it is matter showing that no title was ever obtained. Besides, if parties go to issue, in actions of this kind, upon general averments and denials of title, we think that anything that legally supports or attacks

the title is admissible in evidence, and may be applied by the jury to sustain or defeat it.

The other instructions are not liable to serious objection. Indeed, we may remark that all the instructions given by the court seem not only prepared with remarkable care, but that they present, with extraordinary clearness and accuracy, the various questions of law bearing on the case to the jury.

The judgment is affirmed.

WELLS *v.* MANTES ET AL.

1893. SUPREME COURT OF CALIFORNIA. DEPARTMENT 1

99 Cal. 583, 34 Pac. 324

GAROUTTE, J.: This is an action to restrain appellants from diverting the waters of a certain stream, and thereby depriving plaintiff of the use thereof. The plaintiff, by actual diversion, appropriated 2,500 inches of the water of the stream for the purpose of irrigation. Subsequently defendants, at a point a mile or more above plaintiff's place of diversion, posted notices in accordance with the provisions of the Civil Code, and proceeded to claim and appropriate the waters of the said stream, regardless of any rights of plaintiff to such waters obtained by virtue of his actual appropriation. The only question presented by this record is: Can a person, by the actual diversion and appropriation of water, obtain the right to the use thereof as against a claimant who subsequently posts his notices upon a stream, in accordance with sec. 1415 of the Civil Code, and proceeds thereafter, as required by the statute, to perfect his rights? We have no doubt but that an actual and complete appropriation of the waters of a running stream may be made without following the course laid down in the Civil Code. In De Necochea *v.* Curtis, 80 Cal. 397, which was subsequently followed in Burrows *v.* Burrows, 82 Cal. 564, it was decided that such an actual appropriation was good as against a subsequent pre-emptioner of the land upon which the spring was situated from which the appropriated water flowed. Such was declared to be the law by virtue of the amendatory act of congress of July 9, 1870, which, among other things, provided that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested or accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." It was held that, by virtue of the act of congress quoted, defendant took his title from the government with a servitude resting upon the land. The spring from which the stream flowed was situated upon the land pre-empted, and therefore was the

property of the defendant, Curtis. In contesting De Necochea's right to the use of the water running from the spring, the pre-emptioner in no sense could be classed as a mere trespasser seeking to interfere with the rights of the party enjoying the actual possession of the water. The defendant, Curtis, occupied a position much stronger than as a mere subsequent appropriator, for as to such a one it is apparent at a glance he would have had no rights whatever. In order to defeat the defendant's claims in that litigation it was necessary to hold that the prior appropriator had a right to the use of the waters of the stream by virtue of his actual appropriation and possession, beyond that which was sufficient to defeat a mere intruder, for that term in no sense could be applied to the pre-emptioner, Curtis. If a right to the use of the water of the stream, merely sufficient to defend against a trespasser, would not have been sufficient to defeat the pre-emptioner, it follows necessarily that, the pre-emptioner being defeated in that case, the prior appropriator was recognized as possessing vested rights to the use of the water by actual diversion, and without complying with the provisions of the code. It is substantially held in that case that, when the pre-emptioner took his title, he took it with a servitude upon the land; and this servitude was not created by complying with the statute as to the appropriation of water, but by an actual diversion alone. For these reasons we deem that case directly in point upon the question at bar.

As supporting the determination that a vested right to the use of water may be secured without invoking the provisions of the code, it must be remembered that the congressional legislation quoted was enacted, as is said in Broder *v.* Water Co., 101 U. S. 276, for the purpose of recognizing pre-existing rights to the use of water, rather than establishing new rights. Again, we can not bring ourselves to think that a mere subsequent appropriator under the code occupies a better position than the pre-emptioner whose situation we have just been discussing, and whose rights to the waters of the stream we have held to be secondary to those of the prior appropriator. To say that the pre-emptioner has no rights against the prior appropriator, but that the subsequent appropriator, by posting notices, etc., has a superior right to the prior appropriator, we think inconsistent in the extreme. Such a practice would result in an unjust discrimination, and has no sound support in the law. If the prior appropriator has sufficient rights in the water to defeat the pre-emptioner, and we have decided such to be the case, he has sufficient right to defeat the subsequent appropriator under the code. Section 1418 of the Civil Code reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted;" and we think the scope and purpose of all the provisions of the chapter upon water rights was to establish a procedure for the claimants of the right to the use of water, whereby a certain definite time might be established as the date at which their title should accrue. In this connection we quote from De Necochea *v.* Curtis,

wherein the court, speaking of this question, said: "In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation upon which it had always been held before the statute that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was upon its completion to be deemed an appropriator from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed." No possible injury can result from this construction of the statute. A party contemplating an appropriation of water from a stream is furnished with more definite information for his guidance as to the character and extent of the appropriation by an actual diversion than could be obtained from the notices provided by the statute.

To defeat the respondent's rights, appellants invoke section 1419 of the Civil Code, which reads: "A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." We think this provision does not refer to an appropriator by actual diversion, but only to claimants seeking the right to the use of water under the provisions of this chapter of the code. This is made apparent by an examination of the preceding sections. Section 1415 provides: "A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: that he claims the water there flowing to the extent," etc. Section 1416 reads: "Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works," etc. Section 1418 reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." It thus becomes apparent from these provisions that the word "claimants," as used in section 1419, refers to a party posting and recording the notices required by the provisions of section 1415, and does not apply to an appropriator by actual diversion. For the foregoing reasons it is ordered that the judgment and order be affirmed.[34]

We concur: Beatty, C. J.; Harrison, J.

[34] The pertinent sections of the California Civil Code under which the cases of Wells *v.* Mantes and Taylor *v.* Abbott were decided read as follows:

§ 1415. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

TAYLOR *v.* ABBOTT ET AL.

1894. SUPREME COURT OF CALIFORNIA. DEPARTMENT 1

103 Cal. 421, 37 Pac. 408

HARRISON, J.: The plaintiff posted a notice December 17, 1892, near a spring of water upon certain surveyed public lands in the county of Ventura, stating that he had that day "located" the spring and water right, and "claims" all water in the spring and flowing from it. On the same day he made an excavation in the spring, about three feet square and three feet in depth, for the purpose of marking the place of his intended diversion. A few days afterwards he bought some pipe and lumber with which to complete the means of diverting the water, but did not in fact make any connection with the spring, or complete his intended diversion of the water. On the 28th of December the defendant went upon the land where the spring was located, took possession thereof, built himself a house and moved his family into it, and thereafter held possession of the land, and on the 20th of February, 1893, filed an affidavit in conformity with the requirements of the possessory act of April 20, 1852. After the defendant had taken possession of this land the plaintiff attempted to complete his diversion of the water from the spring, but was prevented from so doing by the defendant. The plaintiff brought this action February 21, 1893, to enjoin the defendant from interfering with him in completing such diversion. The cause was tried by the court, and judgment rendered in favor of the defendant. Plaintiff has appealed.

The plaintiff, by this action, seeks preventive relief for the future, rather than redress for a past wrong; and his right to this remedy is to be determined by the respective rights of the parties as they were at the commencement of the action. At that time the defendant was in

§ 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

§ 1417. By "completion" is meant conducting the waters to the place of intended use.

§ 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

§ 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

§ 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

§ 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title.

possession and occupancy of the land which included the spring, and had filed his affidavit under the possessory act. Under the provisions of section 1 of this act (Stat. 1852, p. 158), he was entitled to "maintain any action for interference with or injuries done to his possession of said land against any person or persons so interfering with or injuring such land or possession," and would necessarily have the same right to defend his possession and rights in the land in any action brought against him. After he had thus taken possession of the land, any threats or conduct on his part by which the plaintiff was prevented from completing his diversion of the water would be in support of his own rights, rather than a wrong against the plaintiff, unless the plaintiff had acquired a right to such diversion superior to the defendant's rights in the land. The court finds that on the 28th day of December, 1892, when the defendant settled upon the land, there was no other in the possession or occupation thereof, and that prior to the commencement of this action, viz., on the 20th of February, the defendant had filed his affidavit under the possessory act, and that his acts in preventing the plaintiff from completing his attempted diversion of the water were for the purpose of protecting his possessory claim. The evidence before the court was ample to sustain this finding, so that it is unnecessary to determine whether the specifications of its insufficiency are such as to preclude it from being considered. It may be conceded that, if the plaintiff had completed the diversion of the water before the defendant had acquired any rights in the land, the plaintiff's rights would have been superior to that of the defendant. Wells *v.* Mantes, 99 Cal. 583. There is, however, no allegation in the complaint that the plaintiff was in possession of the land upon which the spring was located, nor does he claim to have been in the actual occupancy thereof, or to have had any possession other than such as followed from his notice and the digging out of the spring on the 17th of December. His subsequent purchase of pipe, and causing it to be hauled to a point "towards said springs," and several hundred feet distant therefrom, did not tend to establish a possession of the spring, or of the land on which it was located. The notice posted by him at the spring did not conform to the requirements of section 1415 of the Civil Code, and he can not therefore claim any rights thereunder as an appropriator of the water. The posting of this notice was admitted by the answer, so that its exclusion by the court when offered in evidence did not constitute any error.

The plaintiff is not entitled to the relief sought herein by virtue of the provisions of section 2339 of the Revised Statutes of the United States. That section does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right thereon. It merely provides for protecting such rights to the use of water as may have

"vested and accrued" by priority of possession, and as are recognized and acknowledged by the local customs, laws and decisions of courts. Whether the defendant would have had the right to interfere with the plaintiff if, at the time of his entry upon the land, the plaintiff had been actually engaged in laying pipes for the diversion of the water thereon, depends upon other principles of law, and is not presented in the present case. De Necochea *v.* Curtis, 80 Cal. 400, merely holds that when the diversion of the water has been completed before a subsequent pre-emptor acquires any right in the land, it is superior to the pre-emptor's right. The plaintiff was not in possession of the land when the defendant entered thereon, and neither can his intentions or declarations, any more than his preparations to complete the diversion, be regarded as equivalent to an actual possession. Digging at the spring did not constitute possession, but was merely an act indicative of an intention to claim the water, and was to be considered by the court, in connection with other evidence, for the purpose of determining whether the land was vacant. The finding of the court upon this subject must be regarded as determinative of the question .

There are other errors assigned in the admission and exclusion of evidence, but they are not of such a character as require consideration. The judgment and order are affirmed.[35]

We concur: Garoutte, J.; Van Fleet, J.

NIELSON *v.* PARKER ET AL.

1911. SUPREME COURT OF IDAHO

19 Idaho 727, 115 Pac. 488

AILSHIE, P. J.: In 1901 the respondent herein filed a notice of appropriation of the waters of Wood canyon in Oneida county. Commencing with the year 1901 and during subsequent years up to and including 1907, it appears that the respondent did certain work in cleaning out the natural channel of the stream for the purpose of carrying water down the stream to his land. This stream was fed by springs several miles up the canyon above his lands, and it appears that quite early in the irrigation season the water became so low that it did not flow as far down the canyon as to the lands of respondent. In 1907 respondent made a desert entry on lands some four miles up the canyon above his homestead, and thus much nearer the source of supply of this stream. In both 1908 and 1909 he cultivated a small tract on his desert entry and irrigated the same by water taken from Wood canyon.

[35] See Wiel on Water Rights (3d ed.), § 411.

In August, 1908, appellants made application to the state engineer for a permit to appropriate the waters of Wood canyon, for the purpose of irrigating certain lands owned by appellants and lying along this stream. A second application was made in December of the same year, and a third application in June, 1909. Appellants, however, did not use the waters from this stream until June, 1909. This action was instituted to determine the respective rights of the parties and their priorities to the waters of this stream.

The trial court found, first, that respondent's appropriation was entitled to date from 1901, and that he had since that time applied the water to the irrigation of his homestead. In the second place, the court found, as a conclusion of law, that the respondent, having actually diverted and applied the waters of the stream to the irrigation of his lands and particularly his desert entry, prior to the time that appellants applied to the state engineer for their permit to appropriate the waters of the stream, the respondent consequently acquired a prior and superior right to appellants, and was entitled to the waters of the stream, even though he had never applied any of the waters of the stream to his homestead. It is contended by appellants that the evidence is not sufficient to support the court's finding on the first proposition, namely, that the respondent had applied the water to a beneficial use, in that he had used it in irrigating his homestead since 1901. On this question there is a conflict in the evidence. While there is apparently some evidence to support the respondent's contention, there is much evidence against him. As we view the case, our conclusion on the second question will finally dispose of the case, and will render it unnecessary for us to consider the evidence on the first question presented.

It is contended by appellants that under the act of 1903, requiring application to be made to the state engineer for permits, and prescribing that "all rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided" (Rev. Codes, sec. 3252)—all water rights must be acquired under the provisions of the statute, and that there is no longer any such thing as acquiring a water right by diversion and an application to a beneficial use, without first complying with the statute and securing a permit. On the other hand, respondent contends that the right to the use of the public waters of this state may be acquired in two ways: First, by actual diversion and application to a beneficial use, and, second, by pursuing the successive steps prescribed by the statute. Acts 1903, p. 223; sec. 3245 et seq., R. C.

In the outset we should not lose sight of the provisions of sec. 3, art. 15, of the Constitution, which prescribes that: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water.

* * *." Section 3245 of Rev. Codes provides that "as between appropriators the first in time is the first in right."

Section 3242 provides: "The right to the use of the waters of rivers, streams, lakes, springs and of subterranean waters may be acquired by appropriation." The act of 1899, Sess. Laws, 1899, p. 380, sec. 5, provided for the posting of notices and filing copies with the state engineer by appropriators of water and was as positive and mandatory in its requirements as is the present law. Notwithstanding those provisions, this court, in Sandpoint, etc., Co. *v.* Panhandle, etc., Co., 11 Idaho 405, in discussing the methods of appropriating the public waters of this state, said: "A person desiring to appropriate the waters of a stream may do so, either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice, and commencing and prosecuting his work within the statutory time. De Necochea *v.* Curtis, 80 Cal. 397; Wells *v.* Mantes, 99 Cal. 583; Watterson *v.* Saldunbehere, 101 Cal. 112. In the later case his appropriation will be entitled to date from the time of posting his notice, Sess. Laws, 1899, p. 380, sec. 8; Wells *v.* Mantes, supra; Nevada Ditch Co. *v.* Bennett, 30 Ore. 59, 60 Am. St. 777, and note thereto; Works on Irrigation, pp. 44-46; Long on Irrigation, sec. 37, and any intervening locator or claimant of the waters will be treated as subsequent, both in time and right. In such case the appropriation is initiated by the posting of the notice, and an inchoate right thereby arises, which may ripen into a legal and complete appropriation upon the final delivery of the waters to the place of intended use. In other words, by pursuing the successive steps prescribed in the statute and completing his diverting works and applying the water to a beneficial purpose, the appropriation is completed. The only difference between an appropriation initiated by posting notice and one initiated by diversion and application of the waters is that the appropriator who claims under notice is allowed the extra sixty days within which to commence his work, and reasonable time thereafter in which to complete the same."

This court again, in Lockwood *v.* Freeman, 15 Idaho 398, recognized the same principle, and in speaking of the contention made by the appellant in that case that he had acquired a permit from the state engineer, and that his adversary had not complied with the law in the matter of securing a permit or giving notice, the court said: "There is nothing in that contention whatever, as it is clearly shown that all of the waters of said creek had been appropriated by the respondent and his grantors long before any license was applied for by the appellants from the state engineer. The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights can not thus be taken away."

The Constitution and statute of Wyoming is substantially the same as our own on the subject of water and water rights. In Morris *v.*

Bean (C. C.) 146 Fed. 423, Judge Whitson, in speaking of the statutes with reference to notices, etc., said, *inter alia*: "But the rule of relation was in a measure uncertain in its application, in that what constituted a reasonable diligence in the completion of the work was a matter within the sound discretion of the courts. Again, the appropriator who initiates his right by statutory notice is required to designate the amount of water claimed, the purpose for which it is to be used, if for irrigation, the land upon which it is to be applied, etc., thus affording information to other intending appropriators, and giving constructive notice as to the amount of water which has already been claimed from the common source of supply. But where one has actually diverted water, and is using it, the right to its use may, by analogy, be likened unto the doctrine that one purchasing real estate must take notice of the rights of those in possession, notwithstanding the recording statutes. Water diverted from a stream naturally diminishes the volume. One seeking to acquire the right to the use of water must take notice of the amount available and visible, and it must be conclusively presumed that he inquires into the extent of the supply from which the water is to be drawn, and how that supply has been diminished by others whose rights are prior in time. These statutes were never intended to destroy the right of appropriation by methods other than those defined by them. Their only effect is to deny the power of an appropriator, who fails to file the notice required, to claim as of the date of the beginning of his work; the penalty for such failure being to limit the right to the time when the water is actually applied and used."

The doctrine prevailed prior to statehood, and in the earliest territorial history, that the "first in time is the first in right," in the diversion and use of the public waters. Indeed, this is the doctrine that has prevailed throughout the states and territories of the arid West; it is found, expressed in some form or other, in the constitutions of most of the arid states, and has been reinforced by statutes in practically all of the irrigation states. It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this state. Section 3056, Rev. Codes; Ada County Farmers' Irr. Co. *v.* Farmers' Canal Co., 5 Idaho 793, 40 L. R. A. 485; McGinness *v.* Stanfield, 6 Idaho 372; Hall *v.* Blackman, 8 Idaho 272. The legislature, however, has provided for a constructive notice, and to those who avail themselves of the statute and give this notice there is given a certain period of time in which to commence the construction of diverting works, and a further period of time in which to complete such works, and divert the water and apply it to the beneficial use for which the application was made. This is a protection to the claimant; but, if he should actually divert the water

and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords.

Nielson having actually diverted all the water of Wood canyon and used it in the irrigation of his crops grown on his desert entry, prior to the time appellants made application to the state engineer for a permit to appropriate the waters of the same stream, he was therefore "first in right," and could not be deprived of such right through a permit or license from the state engineer, or otherwise.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, J., concurs.

NEVADA DITCH CO *v.* BENNETT ET AL.

1896. SUPREME COURT OF OREGON

30 *Ore.* 59, 45 *Pac.* 472, 60 *Am. St.* 777

This is a suit instituted August 15, 1893, for the purpose of establishing the date and extent of plaintiff's appropriation of water from the Malheur river, in Malheur county, Ore., and to enjoin the several defendants from in any way using the waters of said stream so as to interfere with the full and free use of its appropriation. * * * In the early summer of 1881, C. W. Mallett, I. H. Adams and W. R. Lee came into the state of Oregon, from Nevada, in search of homes for themselves and families, expecting to settle upon government lands, with the purpose of finally acquiring title thereto. Having come upon the arid lands of the Malheur valley, they conceived a scheme of constructing a ditch through which to provide water for the irrigation of such lands accessible thereto as they and others should take up; all the lands of the valley being then vacant, and subject to settlement, except such as had been selected by the Willamette Valley and Cascade Mountain Wagon-road Company. They were impressed with the idea that they could acquire from the government, each, a section and a half of land, under laws providing for the sale and disposition of the public domain. The scheme comprehended an early settlement of that particular portion of the valley, and the upbuilding of a reasonably populous farming community. Other home seekers were even then depending in a great measure upon their judgment, in the selection of suitable locations for future habitation. So that, in view of these considerations, Mallet, Adams

and Lee determined to construct the contemplated ditch, and in pursuance of such determination on July 12, 1881, posted a notice at the point of their intended diversion, claiming an appropriation of 8,000 inches of the water of Malheur river for agricultural and milling purposes, giving generally the route and terminals of the proposed ditch, and, as soon thereafter as practicable, caused a duplicate of the notice to be filed and recorded in the county clerk's office of the proper county. Prior to posting the notice the parties had run a preliminary line of survey along the proposed route, to demonstrate its feasibility, and had located, each, a section and one-half of land under the ditch, with a view of acquiring title thereto; but eventually Mallett acquired title from the government to only one-half of section 20, township 18, range 46 E., and Adams to one-half of section 24, in township 18, range 45 E., but Lee never acquired title to any of the land so located by him. Within a few days after the posting of said notice, one G. W. Blanton, with his family, including two sons, James and John, visited the valley, and, being desirous of settling therein, applied to Mallett, Adams, and Lee for an interest in their appropriation, and thereupon bargained for a one-fourth interest; and soon thereafter, on July 21, 1881, all four of them entered into a mutual agreement whereby it was provided that Mallett should construct the first section, or about two miles, of the ditch, in consideration of $2,400—each to contribute in money or labor to the extent of one-fourth thereof, and that, in case either should fail to so contribute his full proportion, he should forfeit his interest in the ditch to such of the others as should complete it. The agreement was reduced to writing, but, by an oversight, was signed only by Mallett, Adams and Lee. Blanton, however, in March, 1885, after the completion of the ditch, received a deed from the parties so signing the agreement to a one-fourth interest therein. A permanent survey was provided for, and accordingly made by one C. M. Foster, in August, for the distance of about ten miles, commencing at the point of diversion as claimed in the notice; the first section of two miles being located upon a grade of 3.20 feet to the mile, and the remaining or second section upon a grade of 2.16. The ditch was subsequently constructed practically upon this line of survey. Mallett and Blanton, with others to help them, began work in the construction of the ditch soon after the permanent survey was made by Foster. Adams and Lee in the meantime had gone to Nevada for their families, and in November the former returned. Lee did not return, but one J. A. Walters came, by arrangement with him, to erect a house upon his located land, and to assist in his stead with the construction of the ditch. Prior to his departure, Lee paid Mallett $60, to be applied in part payment of his share of the expense of construction. By this time C. H. Brown, a friend of Mallett's, between whom there had been a previous understanding in regard to removing to the valley, should a suitable locality be found, had come to establish a home in the vicinity. Thenceforth Mallett,

Adams, Blanton and Brown pushed the work of construction throughout the winter, as the weather would permit. In the spring these parties were joined in the work by Walters and others, to wit, J. C. Arnold, T. W. Halliday, and J. H. Chandler, all of whom had come from Nevada, by arrangement either with Lee or Adams, with a view to settling under the ditch; and later in the spring the first or two-mile section was completed. In the fall the way was cleared for the second section, which consisted in grubbing out the sage-brush and other shrubs, and putting the land in condition for the plow and scraper. This section is a little over six miles in length, and terminates at what is known as the Dunbar place or tap. In the spring of 1883 they began the work of excavation upon this last section of the ditch, and continued without intermission, except to permit the use of water during the season for irrigating purposes, into the spring of 1884, when it was completed and accepted.

* * * * * * *

Morfitt Extension. In September, 1883, one William Morfitt acquired an interest in the ditch, and, by verbal agreement with the promoters thereof, extended it some four miles, in an easterly direction, at his own expense, stipulating to convey the extension to the promoters at any time that they saw fit to pay him the cost of construction. This extension was completed in 1884,—some say, concurrent in time with the completion of the last section of the original ditch, and others soon after, in the fall of 1884, or the spring of 1885.

* * * * * * *

Thus was constructed the entire ditch. Through conveyances subsequently made by all the parties holding interests in the ditch, and the appropriation of water made through its instrumentality, the Nevada Ditch Company, the plaintiff herein, has acquired the ownership thereof. The stockholders in said company claim to be entitled to the use of the appropriation in proportion to the amount of stock held by each. Some of them are using the water upon lands owned and cultivated individually, and others are renting to parties having no interest in the Nevada Ditch Company, but generally the water is being used for agricultural purposes. Since the year 1886, the year 1894 excepted, plaintiff's water supply has been cut short by reason of the use made of it above its ditch by the defendants. The present capacity of the ditch in the first or 3.20 section is 10,353 inches, and in the second 3,037 inches, miners' measurement. Water was first turned in during September, 1881, which was used in its construction, and was first used for irrigation purposes in 1883. During the season from fifty to sixty acres of land were irrigated, and in the year 1884 two or three times as much water was used for like purposes. From this time on, lands were rapidly reduced to cultivation, and in 1886 there appears to have been use made of all the water the ditch was capable of carrying. As shown by the record of deeds, Cambridge Arnold, T. W. Hal-

liday, J. H. Chandler, J. A. Walters, C. H. Brown, David Dunbar, Daniel Smith, William Morfitt, and Mary Richardson, all acquired an interest in the ditch in 1883. James W. Virtue acquired an interest in 1884; A. McGregor and Minnie J. Danielson (successor to Charles Howard), in 1885; and F. R. Coffin, J. L. Cole, and James Richardson, in 1886. Many of these persons bargained for their respective interests some time before procuring the deeds. Besides these, it is in evidence that James Blanton, John Blanton, and J. W. Green held interests in the ditch in 1883; so that, including the original promoters, Mallett, Adams, and G. W. Blanton, there were fifteen persons possessing subdivided interests in the ditch in 1883, to which number was added one in 1884, three in 1885, and three in 1886, making twenty-two in all.

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WOLVERTON, J.: Before proceeding to the discussion of the questions of vital importance, we will dispose of some that may be regarded as preliminary or incidental only.

The defendants all filed demurrers to the complaint, which were general in their nature, and were all overruled by the court below. It is insisted here that the court erred in so doing. The objection is taken upon the theory that plaintiff's complaint comprehends an aggregate of individual appropriations, taking their inceptions at different periods, and that the complaint should have stated facts supporting each individual appropriation, and then the acquirement of them by plaintiff. But the complaint states a single appropriation, upon which all the rights claimed are dependent; hence the objection is not well taken.

* * * * * * *

The plaintiff, by its complaint, claims a single appropriation of 3,037 miners' inches of the water of the Malheur river, made as of date July 12, 1881,—that being the date when Mallett, Adams and Lee posted their notice of appropriation at the original point of diversion through plaintiff's ditch. To sustain the appropriation as of the date named, the doctrine of relation is invoked; it being contended that the promoters of the ditch prosecuted the work of construction with reasonable diligence, and had it fully completed within a reasonable time after the posting of such notice. There can be no question but that they did pursue the work of construction with all the diligence that could reasonably be required of them. The work was commenced in August or September after the posting and recording of their notice and for the purpose of aiding in the excavation of the first section of upwards of two miles, a dam was constructed at the head of the proposed ditch, and a diversion made. This section was completed as early as the spring of 1882. Prior to the posting of notice a preliminary survey had been run, with a triangle covering, in extent at least, the first section completed; but in August, prior to the beginning of the work of construction, a permanent survey was made by C. M.

Foster, and stakes and monuments set to indicate the route and actual location of the ditch, which was practically followed in the work of construction. This survey is spoken of as being ten miles in length, but the actual length of the ditch from the point of first diversion is something less than nine miles. In the fall of 1882 the way was cleared for the second section, reaching to the eastern terminal of the Foster survey. In the spring its excavation and construction were prosecuted until the irrigating season of that year, when it was discontinued to permit of the use of water through the completed portion of the ditch, by which use from forty to fifty acres of garden and small crops were irrigated during the season. The work of construction was resumed in the fall, and continued until the completion of the second section, in the spring of 1884. Water was run through the full length of these two sections in the year 1884, and used for irrigating purposes. There is some dispute as to whether the latter section was completed in the spring of 1884, or a year later; but, if not in every detail, it was practically completed in 1884. This shows an exercise of due and reasonable diligence, considering the magnitude of the undertaking, and the circumstances and difficulties usually attending the inception and prosecution of such work in a new country by pioneers with limited means and facilities. Kimball *v.* Gearhart, 12 Cal. 28. It was sought to prove the existence of a custom which it is alleged prevailed in that section of the country, whereby parties seeking to make an appropriation of water for agricultural or beneficial purposes were required to post at the point of diversion a notice containing, in substance, a statement of the amount of water claimed, the purposes to which it was to be applied, the names of the appropriators, the general direction of the proposed ditch, and the terminals thereof, and have the same immediately recorded in the office of the county clerk or the proper recording officer of the county in which the appropriation was sought to be made. The existence of such a custom is combated by some of the defendants, and by others it is admitted, but in a qualified sense. By the latter it is claimed that the recording of the notice was not required. The referee found that the custom did exist at the time of the inception of each and every of the water appropriations involved in the controversy, to the full extent as stated above, and in this he is supported by the evidence. Under these conditions the plaintiff's appropriation would relate back to the date of posting the notice by Mallett, Adams and Lee, July 12, 1881; certainly, to the date of their commencing the construction of the ditch, which was either in August or September following. The rule seems to be that where notice is required, and one is given, and thereafter the work necessary and requisite to secure a diversion for a beneficial use is begun in good faith, and prosecuted with due and reasonable diligence until completed, and actual diversion made, the appropriation relates back to the first step taken. The authorities are somewhat in conflict as to what constitutes the

first step,—whether the posting of the notice, or the actual commencement of work. Cole *v.* Logan, 24 Ore. 309; Kinney, Irr. sec. 168; Woolman *v.* Garringer, 1 Mont. 535. If, however, there has been an unreasonable delay in carrying forward the work of construction, and the works and appliances necessary to a diversion for the useful purpose intended are not completed within such time as reasonable diligence would require, the appropriation is considered by Mr. Black as beginning with the date of actual diversion; and by Mr. Kinney, when the appropriation is fully completed. Black, Pom. Water Rights, sec. 55; Kinney, Irr. sec. 161. But whether the one or the other of these authorities should be followed does not become material for us to determine.

It is not seriously contended that the plaintiff's appropriation is invalid, but that it should be confined, as to quantity and priority, to the rights acquired by Mallett and Adams, which would accord to it an appropriation of from 260 to 500 inches, dating from August or September, 1881, and that any appropriation in excess of this quantity should be recognized only as having been made at the date of actual user for beneficial purposes. In other words, it is insisted that plaintiff's present appropriation is a conjoined aggregate of lesser appropriations, having their inception at different dates, and that, when traced to their several sources, that only which is personal to Mallett and Adams will antedate the defendants' appropriations, and that, if thus analyzed, the quantity of the appropriation having priority over those of the defendants will be found to be small, and not to exceed the quantity named. This brings up a question which we have found difficult of solution, and the conclusion at which we have arrived has not been reached without some misgivings. Let us first get a clear idea of the elements which enter into, and go to establish, a valid appropriation of the waters of a public stream to a beneficial purpose, as we shall be aided by the process, and be the better enabled by the application of analogous cases to the salient features to determine with greater satisfaction the quantity and legal status of the plaintiff's appropriation. The rule is concisely laid down by Mr. Justice Moore in Low *v.* Rizor, 25 Ore. 557, that: "To constitute a valid appropriation of water, three elements must always exist: First, an intent to apply it to some beneficial use existing at the time, or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and, third, an application of it, within a reasonable time, to some useful industry." In elaboration of these elements, Mr. Pomeroy says of the first: "The fundamental doctrine is well settled that the appropriation must be made with a bona fide present design or intention of applying the water to some immediate, useful, or beneficial purpose, or in present, bona fide contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming." Black, Pom. Water Rights, sec. 48. Mr. Justice Lord, in Simmons *v.* Winters, 21 Ore. 42, says,

"There must be some actual beneficial purpose, existing at the time or contemplated in the future, as the object for which the water is utilized." This language was approved by Chief Justice Bean in a later case. See Hindman *v.* Rizor, 21 Ore. 120. It has been suggested that the intent and the application is a matter personal to the appropriator, and that whatever he purposes to do with the water must be done by himself, and in connection with his own property. From the nature of things, the intent to apply to some present or future contemplated use must rest with the appropriator. It is a mental status which may manifest itself by subsequent declarations and acts, such as posting notice, diverting the water by the building of a dam, the construction of a ditch or other means, and by applying it to the contemplated use. Ordinarily a person may declare his intentions through another, and may act through an agent, and yet the declarations and acts are as much his as if they were the result of his personal and physical application; and, unless there is some reason why an appropriator may not invoke the ordinary agencies for the purposes of perfecting his appropriation, he ought not to be denied the right of their employment for such purposes. So far as it may become necessary to construct the necessary appliances to secure the actual diversion of water, and to transport it to the place of use, and even as it concerns the physical application to the use, there can be no doubt of the right to his employment of such agencies. But the purposes of the appropriation must abide with the appropriator. It must be a design of his concoction or adoption, and the use he proposes must be a beneficial one. Thus far it is perfectly manifest that the act is personal to himself. So that, taking these propositions as granted, the inquiry is narrowed to the object to which the use must be applied. Must the appropriator be the proprietor of, or have an interest in, the object in connection with which the water must be utilized, in order to perfect the appropriation, or will it serve the purpose if the water is supplied to some other person, who makes the appropriation in connection with an object in which the appropriator has no interest? To state the proposition concisely, can A appropriate water for the purpose of running B's mill, or irrigating his lands, or working his mines, and will such use made of it by B, granting it to be beneficial, inure to the appropriator's benefit, in the process of perfecting his appropriation? For the present, let us consider the other two elements which go to make up a valid appropriation. As the water of a public stream, while flowing in its natural channel, is the property of the public, an individual, if he would obtain a usufructuary interest therein, must lay hold of so much of it as is required for his use; that is, make a diversion whereby he is thereafter enabled to assert absolute control over it. This needs no elucidation. The third element requires an actual user for some beneficial purpose. The term "appropriation" is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water

of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured. An appropriation proper is not made until there has been an actual application of the water claimed, to some beneficial purpose, or some useful industry. All rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation, but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature.

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There are two periods of gestation, if we may be allowed the expression: One concerns the time required, measured by due and reasonable diligence, for the building and construction of such works and appliances as may be necessary and convenient for diverting the water and carrying it to the place of use (of this we have spoken heretofore), and the other the time needful to utilize the water by the actual application of it to the contemplated beneficial purpose. The appropriation is in every instance limited in quantity and quality by the uses for which the appropriation is made.

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The claimant is entitled to a reasonable time after he has diverted and carried the water to the place of use in which to make the actual application to the contemplated useful purpose; the prime requirement being that he must use reasonable diligence in making the application, the attendant and surrounding circumstances being considered. We quote again from Mr. Justice Lord in Simmons *v.* Winters, supra: "If the amount of water appropriated is within the given beneficial purpose for which it was taken,—no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can reasonably be done,—although more than can be beneficially used for the present, it is nevertheless a valid appropriation." See, also, Hindman *v.* Rizor, supra. In Conant *v.* Jones, 3 Idaho 606, the court say: "A person who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use; such time, at least, as is reasonable under all the circumstances of the case." See, also, Moss *v.* Rose, 27 Ore. 598. In this case the defendant had cleared off sagebrush, and reduced to cultivation 100 acres, out of 160, during a period of seven years, and was still engaged in clearing up the balance for the purpose of agriculture; and it was held, under the circumstances surrounding the case, that he was exercising reasonable diligence. And in Cole *v.* Logan, 24 Ore. 304, Mr. Justice Moore says: "As he [defendant] adds to the area of his cultivated land, he may increase the amount of his diversion until he has acquired the quantity necessary to properly irrigate the whole tract, and any

subsequent appropriator diverts the water subject to such prior claim. To entitle the defendant, however, to the benefit of such an appropriation, he should, within a reasonable time, apply the water to such beneficial use. As fast as he can reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose." These authorities are sufficient to show that the proposition is settled in this state.

Now to return to the contemplated use or the object for which the claim of appropriation is made. After a completed appropriation, the appropriator may sell and convey his lands in connection with which the appropriation was made, and the water rights acquired thereby will pass appurtenant to the land. And this is so even where possessory rights to the public lands, the title to which has not yet been acquired from the government are transferred by delivery of possession without deed or other writing. See Hindman *v.* Rizor, supra, and Low *v.* Schaffer, 24 Ore. 242. The ruling under the facts of the former of these cases would seem to imply that, if the party who initiated the appropriation had not yet completed it when the transfer of the possessory title to which the water right was appurtenant took place, his successor could then complete the appropriation. The point, however, was not specially made, but we think it must be conceded that such would be the case. Suppose A is the owner in fee of a tract of land, or of a possessory title thereto, under the government, and initiates a water appropriation for contemplated use for the irrigation of such tract by proper notice, and actual diversion and conveyance to and upon the land, but, before he has a reasonable time in which to apply all the water needed to the use designed, he conveys the land, with his water rights thus acquired, to B, surely B could complete the appropriation by reducing the remainder of the land to cultivation, and applying the water to the irrigation thereof,—that is, to A's contemplated use. In this instance B, having acquired A's initiative right, makes the application in his stead, but to the object in connection with which A designed the use. Take another case. Suppose A makes a diversion for a contemplated use upon White Acre, which he owns, and afterwards, and before he has completed his appropriation by actual user of all the water of his appropriation needed for the cultivation of White Acre, he purchases Black Acre, of like dimensions, and requiring a like quantity of water for its cultivation, and thereupon he abandons White Acre, and uses the water upon Black Acre; can he thus complete his appropriation? It would seem reasonable that he could, although upon this proposition we have found no adjudicated cases. If such is the case, here is a change of the object in connection with which the use was primarily designed. However, in either case the object was primarily the property of the appropriator. After an appropriation is completed, it is settled that there may be a change of the place of use. See Wimer *v.* Simmons, 27 Ore. 1. Even a sale or transfer of the whole or a part of the appropriation may then

be made, either in connection with, or separate and apart from, the land, and the purchaser may use it for an entirely different and distinct purpose. Low *v.* Rizor, 25 Ore. 558; Drake *v.* Earhart, 2 Idaho 750; Strickler *v.* City of Colorado Springs, 16 Colo. 68. Mr. Pomeroy, in his work on Water Rights (section 47), as touching the methods by which an appropriation is effected, asserts the following proposition: "The very object of his [the appropriator's] appropriation may be to conduct the water from the stream, through a ditch or canal across the intervening public lands, to the tract which he possesses as a mining claim, a farm, or a mill, or even to sell and dispose of the water, thus conducted through the canal, to other parties, who use it for like purposes on their own 'claims' or tracts of land." And Mr. Kinney states the proposition in very much the same language. See Kinney, Irr. sec. 156. No authorities are cited in support of the text. The language here used by the learned authors, that the very object of the appropriation may be to sell and dispose of the water to other parties, who may use it for like purposes on their own claims or tracts, is only reconcilable with the idea that the contemplated use may be for other persons not concerned in the initiation of the appropriation, as they are discussing the methods of appropriation, not of the property rights after a completed appropriation, nor of a sale or disposal of the use while the appropriation is in process of acquirement. And we have seen that there can be no appropriation without actual application to the contemplated use. Mr. Kinney, in a succeeding section (section 171), in a summary of his chapter upon "Methods by Which Appropriations of Water may be Made," says, "At the very inception of a valid appropriation of water from a natural stream or lake, there must be a bona fide intention upon the part of the one attempting to appropriate the water to apply the same, when his appropriation is completed, to some of the beneficial or useful purposes." Then, after stating the office of the notice and the necessity of diversion, he says, "All the water, when so diverted, must be applied to some one of the beneficial or useful purposes." Mr. Pomeroy is also in accord with this view, although he does not state it so clearly. In this statement of the rule we find no element which requires the appropriator to make the contemplated use in connection with lands or property of his own, and the rule thus stated is complied with when the appropriator's contemplated use is to work the mines, run the mill, or irrigate the land of another. In Simmons *v.* Winters, supra, Mr. Justice Lord says, "While a settler can not appropriate more water from the public domain than is necessary to irrigate his land, nor any to irrigate lands which he does not intend to cultivate, nor own or hold by possessory title;" and from this language it is argued that the rule goes further than as stated by Mr. Kinney, and requires the appropriator to possess or own the lands in connection with which the contemplated use must be wrought out by a physical application thereto of the water claimed,

but the language was used with reference to the facts of that particular case. So, also, language of somewhat similar import, used by Hawley, C. J., in Barnes *v.* Sabron, 10 Nev. 243, cited in Simmons *v.* Winters. In each of these cases the settler was making an appropriation for use upon his own lands. The question of a contemplated use elsewhere was not made. So that these cases are not authority here. The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the development and advancement of beneficial industries. In many localities where the water is difficult of diversion, and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, these general purposes would be entirely defeated, simply for the reason that such holders could not bear the burden of making the appropriation. In such cases other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the land owner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so that if the user must be the appropriator, and the appropriator the landholder, the arid regions in many places would remain arid, whereas otherwise they could be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for, and upon the possessions of, a person other than the appropriator. The authorities we have seem to support the rule that it can be, and we believe it is correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user. In Colorado, within the meaning of her constitution, it is held that the appropriation of water consists of two acts: First, a diversion; and, second, the application thereof to a beneficial use,—and the latter is declared to be the essential act. Hence it is there established that canal companies which are engaged in diverting the water and carrying it to the consumer are to be "regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners." Reservoir Co. *v.* Southworth, 13 Colo. 130; Wyatt *v.* Irrigation Co., 18 Colo. 308. In effect, the carrier (that is, the canal company) stands in the relation of an agent to the user, who must be regarded as the principal. But where a third element is essential to a valid appropriation, consisting of an intent which, by the nature of things, is peculiarly the act of the appropriator,

and which must precede all others in the process of appropriation, it would seem that he who designed the scheme and made the diversion was the principal, rather than the user, who applies the result of the former's labor to his beneficial purpose. But, in whatever capacity the parties to the appropriation may be considered, the result is the same. The water of a public stream is eventually applied to a beneficial use, and the general purposes of such appropriations accomplished. As to who, in general, would own the appropriation when completed, it is not necessary for us to say at this time. We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation and the user. Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of the waters of public streams. The appropriator can not withhold the water from a beneficial use. He must be diligent in making the diversion, or else he loses his inceptive right, and reasonably expeditious in making the application to a beneficial use, otherwise his appropriation will be measured by the quantity actually used; and he must not cease to use the waters appropriated, upon pain of suffering an abandonment. And going with all this is the primordial condition that when not using he must suffer others to use.

Tested by this understanding of the law, let us examine the plaintiff's appropriation. Mallett, Adams and Lee contemplated a use, not only to be applied by themselves, but by such others as might come in under their ditch. They had in mind some persons with whom they had arranged to join them in the new settlement, should they find a suitable locality; and they expected others to come, as they did subsequently, some of whom they brought in themselves. Indeed, the very object of the scheme was to induce immigration and settlement, which they expected to accomplish by diverting the water, and conveying it to such localities as would be convenient for use, with a purpose of developing the appropriation with the aid of such other settlers as would apply the use. They had a reasonable expectation that there would be a demand for water as soon as they could convey it to a convenient place for the intended use, and in this respect the scheme could not be said to be merely speculative, impracticable, or visionary. Their original scheme comprehended the building of the ditch as far as the Dunbar place or tap. This is shown by the fact that their survey comprehended only that portion of the ditch. They refused to build the Morfitt extension, but allowed him to construct it, and conveyed to him an interest in the main or original ditch. But it was no part of the original design to carry the water down for the use of Morfitt or other persons convenient to such extension, and the same may be said of the Danielson extension. It was incumbent upon Mallett, Adams and Lee to begin and construct the works and appliances necessary to a diversion and conveyance of the water to the place of use with all due and reasonable diligence. This they did, and accomplished their

purpose in this respect in 1884. The fact that Lee dropped out could make no difference. Mallett and Adams carried forward the enterprise as it was conceived and had been entered upon by all the parties. It was also incumbent upon them to have at the time, or approximately with the time, of completing such works and appliances, users ready and willing, with sufficient lands and possessions to absorb the appropriation by application to a beneficial use within a reasonable time thereafter. They complied in part with this condition, by arranging to divide their appropriation with Blanton, Brown and others before they had completed the diversion; and at or near the time of such completion they contracted with others for transfers of additional subdivided interests, all of whom began the use of water through the ditch at about or near the time of the completion of the works and appliances for the diversion and conveyance of the water to the place of use. In Irwin *v.* Strait, 18 Nev. 436, one Withington had purchased a tract of land, diverted water, and caused it to flow thereupon in April, 1867, but did not begin the proper use of it for irrigating purposes until the spring of 1868. In commenting upon this state of facts, Belknap, speaking for the court, says: "We do not think that, in exercising reasonable diligence to appropriate the water, Withington was bound to use it for irrigation during the year 1867. It may have been impracticable, by reason of the season, or the difficulties incident to an unsettled country, to have applied the water to irrigation the same spring in which he made his purchase." So it would seem, in the case before us, that if parties, through the intervention of the appropriators, began the use of water as early as the irrigating season of 1885, there would have been the manifestation of sufficient diligence to prevent the appropriation from lapsing. Whatever diversions were made through the Morfitt and Danielson extensions can not be considered as within the Mallett, Adams and Lee appropriations, as their contemplated use did not comprehend an application through either of these extensions; and, as far as any appropriations made by parties through these extensions are concerned, they must be considered as individual appropriations, independent of that made by Mallett, Adams and Lee, and their inception must date from the time of actual user, or at most from the time of the commencement of use, in each individual case. There was an enlargement of the ditch in 1888, and a change of the point of diversion, and at or subsequent to that time parties began the use of water; but the evidence is too meager by which to fix the date and quantity of such appropriations, and hence they can have no place in this investigation. The Nevada Ditch Company, the plaintiff herein, has acquired various subdivided interests of parties who acquired through Mallett, Adams and Lee, and to this extent it must be considered as the owner of their appropriation. The stockholders may or may not be entitled to the use of water, as it regards the company, in proportion to the number of shares of stock they hold therein, but the stock is

ceeded to the particular right reserved by Wormser, Asbury et al. are entitled to 430 inches of water, and entitled to have it conveyed through this canal for a distance of about two miles, to the head of the Big Timber canal lateral, which thence conveys the water to lands owned by Asbury et al.

The trial court did not make any specific findings of fact. There is one general finding in which the court made a tabulation of the appropriators, the date and amount of each person's appropriation, and made its decree to conform thereto. In doing so it awarded to the Glass-Lindsay Company 1,000 inches, of date December 20, 1892.

The argument of appellant company is that the finding of the court and the decree so limiting its rights are not supported by the evidence.

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From the evidence in the record it appears that about December 20, 1892, the predecessors of this appellant posted the required notice, claiming 5,000 inches of water; that they complied with the statute in filing the notice in commencing, prosecuting, and completing the work on the ditch; that the ditch when completed had a capacity of 2,200 inches, if the flume mentioned would carry that amount; and under section 4848, Revised Codes, the excess claimed over that amount was relinquished and the claim itself limited to 2,200 inches, or to the capacity of the flume if less than that amount. It further appears that at the time the claim was initiated there were arid lands susceptible of irrigation from this ditch, in extent sufficient to require the entire 2,200 inches and more. It further appears that the original claimants and their successors initiated the right and prosecuted it for the purpose of supplying water to irrigate these available lands. Apparently some of these lands, at least, were public lands, and as settlers have come upon them and have made demands for the water the same has been supplied. The quantity required at the time the ditch was completed was comparatively small. But the demands have increased as the lands were settled upon or cultivated, until, during 1910, 1,150 inches were required and furnished. The question, then, arises: When, if at all, did appellant make an appropriation and what was the extent of such appropriation, if made? The trial court applied the rule of relation back, and fixed the date of appellant's appropriation as of the date of posting the notice. There is not any fault found with this portion of the decree, and could not be. So that, the court having found that appellant and its predecessors made a valid appropriation of date December 20, 1892, the only question remaining for solution is: What was the extent of that appropriation? And the answer to this involves a consideration of much, if not all, of the law of water appropriation.

It is quite well known that the law itself had its origin in the customs of miners and others in California. These customs had ripened

into well-recognized rules some considerable time before there was organized local government in that country and before there was any legislation upon the subject whatever, and these customs were subsequently recognized as having the force of law, by state and national legislation and by the decisions of courts. Woolman *v.* Garringer, 1 Mont. 535; Jennison *v.* Kirk, 98 U. S. 453, 25 L. ed. 240; Broder *v.* Water Co., 101 U. S. 274, 25 L. ed. 790. These customs formed a part of our unwritten law, or, as it might more aptly be termed, the common law of this country as distinguished from the common law of England. King *v.* Edwards, 1 Mont. 235; Jennison *v.* Kirk, above; Carter's The Law, Its Origin, Growth and Function.

In 1870 our legislature passed an act (Laws 1869-70, p. 57) which apparently undertook to limit the right to appropriate water for irrigation purposes to persons or corporations having title to, or possession of, agricultural lands. Tucker *v.* Jones, 8 Mont. 225. The act recognized the rights acquired or to be acquired under the rules and customs of the early settlers; but there was not any attempt made to prescribe any other method by which such rights might be secured. By an act of February, 1877, the right of a prson or association of persons or a corporation to appropriate water to sell, rent, or otherwise dispose to others was authorized. In 1885, however, there was a distinct departure made by the legislature in enacting a statute under the title, "An act relating to water rights." These several acts were carried forward in the compilation of 1887, as chapter 74, Fifth Division, Compiled Statutes, and with some modifications into the Civil Code of 1895, as title 8, division 2, part 4; and again, with slight amendments and additions, into the Revised Codes of 1907, as sections 4840-4891, and now constitute the law of appropriation of water, so far as controlled by legislation. As respects the method to be pursued by the intending appropriator proceeding under the statute, there has not been any substantial change made since the original act of 1885 went into effect. We are of the opinion that there are, then, two distinct periods in the history of our water right law. The first comprises the time from the earliest settlement to 1885, during which period the rights were determined exclusively by the rules and customs of settlers; and the second extends from 1885 to the present time. As the rights of this appellant arose since 1885, we are not concerned with the rules of law applicable to the first period, except so far as they may reflect upon the legislation in force during the second period.

Our act of 1885 is in all substantial particulars a copy of the California act of March 21, 1872. The California act was called in question in De Necochea *v.* Curtis, 80 Cal. 397, in a contest between De Necochea, who claimed an appropriation of water, and Curtis, who claimed as riparian owner. De Necochea had diverted the water from a stream and actually applied it to beneficial uses after the

statute of 1872 went into effect, but he did not comply with the statute by posting notice, etc., or make any attempt to do so. He had, however, actually used the water before Curtis settled upon the riparian land. The only question before the court was whether a valid appropriation could be made after 1872 without complying with the statute. The conclusion of the court was that such an appropriation could be made, that the mode prescribed by the statute was not exclusive, but that the right acquired by compliance with the rules and customs of the early settlers was fully recognized by the statute. Section 1419, Cal. Civ. Code (section 4849, Mont. Rev. Codes). After quoting section 1418 of the California Civil Code, the court said: "In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation." * * *

In Murray *v.* Tingley, 20 Mont. 260, this court had before it the single question: Can a person make a valid appropriation of water after the statute of 1885 went into effect, without complying with the statute? After citing De Necochea *v.* Curtis and Wells *v.* Mantes, and quoting the language from the former opinion which we reproduce above, this court said: "We think the construction of the statute by the Supreme Court of California is logical and correct, and are of the opinion that the Montana act of 1885 should be construed in the same manner." That the conclusion reached by the California court in each of those cases, as well as the conclusion of this court in Murray *v.* Tingley, is correct, does not admit of argument. * * *

But we are of the opinion that by enacting the statute of 1885, and in carrying it forward into the several compilations since, our legislature had in mind a purpose in addition to those stated by the California court and by Mr. Justice Buck in Murray *v.* Tingley, above. That purpose was to prescribe the steps necessary to be taken to effect a complete appropriation of water. This is manifest from the statute itself. It specifies certain acts which must be done and then concludes by saying: If you perform these acts, your right relates back to the date of posting notice. What right? The right to the use of water. Section 4849. But a valid subsisting right implies a completed appropriation, and necessarily so. It would be absurd and contrary to the very terms of the statute to say that before you have a completed appropriation you have secured a right to the use of water which relates back to some preceding date. The right of an appropriator to use water depends upon his appropriation of it. In Maeris *v.* Bicknell, 7 Cal. 262, 68 Am. Dec. 257, the court said: "Until such actual appropriation there can exist no complete right to the use of water, for the party may never carry out his intention." And though Mr. Long insists that actual use is a necessary prerequisite to a completed appropriation, he nevertheless announces the following as the doctrine of relation: "The rights of an appropriator of water do not become absolute until the appropriation is completed by

the actual application of the water to the use designed; but where he has pursued the work of appropriation with due diligence, and brought it to completion within a reasonable time, as against other appropriators, his right will relate back to the time of the commencement of the work." Section 51. But our statutes declare that the right accrues upon the completion of the ditch, canal or other means of diversion, and it must be upon the theory that the appropriation is then complete, and this is the view entertained by Pomeroy. Black's Pomeroy on Water Rights, secs. 54, 55.

The doctrine of relation was recognized before the statutes were enacted; but the point of time to which the right then related was the time when work was commenced upon the ditch, canal or other means of diversion. Woolman *v.* Garringer, 1 Mont. 535. We doubt whether a party could ever invoke the doctrine of relation until his appropriation was completed; and we are led irresistibly to the conclusion that, before the statute makes applicable the doctrine, a completed appropriation must have been effected.

After referring to the conflicting views expressed by the courts, and as if to emphasize the view we have announced, as well as to point out the difficulties which the contrary theory will necessarily create, Mr. Wiel says: "In appropriations for future use (which are generally upheld if bona fide), also, this divergence of views will probably cause difficulty. The original theory, considering the appropriation complete on completion of the construction work and diversion (the taking of possession of the water), necessitates the enforcement of the doctrine of relation from that time; whereas, when the acquisition of the right is delayed until actual application, it will keep open and uncertain for years (under frequent decisions) the doubt whether an appropriation exists, as some states allow years to pass (if a reasonable time) before the application need be made; and after those years of uncertainty, will cut off the intervening rights of other claimants." 1 Wiel on Water Rights in the Western States, sec. 396.

We are of the opinion that the act of 1885 intended: (1) To preserve the right which the appropriator had theretofore; and (2) to provide an additional method of making an appropriation. In other words, during the first period of our history above, there was but one method of making an appropriation, and that was by complying with the rules and customs of the pioneer settlers; while during the period since 1885, two distinct methods are prescribed, the first by complying with the rules and customs of the early settlers, and the second by complying with the terms of the statute. We imagine that the members of the bench and bar of this state would be very much surprised if told at this late day that an appropriation of water can not be made by pursuing the method prescribed by statute.

Speaking of an appropriation after the statute of 1872 was enacted in California, Wiel, vol. 1, sec. 364, says: "An appropriation may be made by a complete, actual diversion for a beneficial purpose, without

following the statute, or else by proceeding under the statute. * * * These two are the only methods. Unless there is a right by actual diversion as below set forth, or by compliance with the statute, it can not be spoken of as an appropriation."

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We are satisfied that the statutory method of making an appropriation is entirely distinct from the method which may be pursued under the rules and customs of the early settlers; and, furthermore, that the statute provides for all the steps necessary to be taken by one who follows them, to secure a completed appropriation. Those steps are: (1) Posting notice. (2) Filing notice with the county clerk and recorder. Section 4847. (3) Commencing work within forty days after posting notice. (4) Prosecuting such work with reasonable diligence. And (5) actual completion of the work. Section 4848. These are all the requirements of the Code, and by what authority shall any additional exaction be made? "The Code establishes the law of this state respecting the subjects to which it relates." Section 6214. Our conclusion is in entire harmony with the theory of appropriation as shown by the history of its origin, growth and purpose; and if our conclusion is not correct, then there is not any such thing as an appropriation of water, under or by virtue of the statute. Either the statute provides a complete mode of acquiring the right to use water by appropriation, or it does not prescribe any at all.

* * * * * * *

In proceeding under the rules and customs of the early settlers, whether before or since the enactment of the statute, the intending appropriator must take actual possession of the water; but from one who proceeds under the statute, actual use of the water can not be exacted as a prerequisite to a completed appropriation. The statute does not require it, but, on the contrary, makes provision, compliance with which is the equivalent of actual possession. We quote again from 1 Wiel, sec. 362, as follows: "Having found water that can be appropriated and a proper place to appropriate it, the right to the water is not complete until the water is actually taken into one's possession, or rather, until all work preparatory to the actual use of the water is completed, since that is the equivalent of taking possession; it is the nearest to possession that the nature of the right makes possible." Upon the theory thus advanced, the claimant who proceeds under the statute, and performs the acts required as set forth above, has a completed appropriation of water upon the completion of the work on his ditch, canal or other means of diversion, even before the water is actually applied to a beneficial use. The correctness of this view, we think, is emphasized by consideration of the opposing doctrine. In Colorado it is held that actual application of the water to a beneficial use is a necessary prerequisite of a completed appropriation, and this doctrine is followed in some of the other states. Our act of 1877, above, specifically recognized the right of an individual to appropriate water to rent or sell to another; but if the Colorado

doctrine be invoked here, such individual could never make his appropriation, for, under the Colorado theory, the user and not the first individual would be the appropriator, and this is the only consistent position to assume, if actual use is a necessary step to a completion of the appropriation. But such a position is inconsistent with our act of 1877, which was carried forward in the compilation of 1887 as section 1263, into the Codes of 1907, as section 4860. In Oregon it would seem that under the rule there recognized, as applied to the supposed case above, the original claimant is dependent upon the volition of his customer, a third person, and one a stranger to his enterprise, to complete his appropriation by the application of the water to actual use.

While the act of 1870, above, sought to limit the right to appropriate water for irrigation to persons or corporations owning or in possession of agricultural lands, the provision was omitted advisedly from the Codes of 1895 and 1907, and it has since been held that the appropriator need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes. Toohey *v.* Campbell, 24 Mont. 13; Smith *v.* Denniff, 24 Mont. 20, 81 Am. St. 408. Again, art. 3, sec. 15, of the Constitution of Montana, provides: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use * * * shall be held to be a public use." Section 3808, Revised Codes, authorizes the formation of a corporation to supply water to the public; while section 3819 gives further recognition to the same right. Section 4841 declares that the appropriation must be for some useful or beneficial purpose; but the use to which the water is to be applied need not be immediate, but may be prospective or contemplated. Toohey *v.* Campbell, above; Miles *v.* Butte Electric and Power Co., 32 Mont. 56; Smith *v.* Duff, 39 Mont. 382, 133 Am. St. 587.

Assume that a corporation which does not own, control or possess any land is organized for the purpose of selling or renting water to settlers to irrigate arid lands; that it proceeds under the statute to make its appropriation and fully complies with all the statutory requirements, completes its distributing system, and is ready and offers to supply water to settlers upon demand. Now, if the corporation can ever make an appropriation, it has done so, for it has performed every act which it can perform. It can not use the water itself, for it has no land or other means of use. Any further acts must be performed by its customers who are to be the users. Under such circumstances, the Colorado court, insisting upon actual use as a necessary prequisite to a valid appropriation, holds that the corporation is not an appropriator at all, but that its customers become the appropriators of the several quantities of water which they use, 1 Wiel, sec. 396; 2 Wiel, sec. 1338; and this seems the only logical conclusion if actual use is necessary to complete the appropriation. But such a result is a denial of the right of the corporation to make

an appropriation, a result which can not be reached in this state, where our Constitution and laws specifically recognize the right of a corporation to make an appropriation, unaided by the acts of third parties. There may be lands available for irrigation at the time the corporation's system is completed; but the corporation can not compel people to utilize their lands, and, if they do, it can not compel them to use its water. If the appropriation is not completed until the water is actually used, it is apparent at once that the corporation's right, if any it has, is so intangible and uncertain as to be of no value, whatever amount of money may have been expended on the work. If the land sought to be reclaimed should be government land, the corporation would be confronted with the additional difficulty that it can not compel people to settle upon such lands, and its appropriation would depend upon the tide of immigration and the wishes of the settlers when they do come in, if use is necessary to complete the appropriation.

In the note to Nevada Ditch Co. *v.* Bennett, 30 Ore. 59, as reported in 60 Am. St. 777, the author reviews the history of our water right law as disclosed in the decided cases, and upon the particular question now under consideration says: "The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and in many instances the chief, and even the sole, object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked or lands to be irrigated. In cases of appropriation for the purposes of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly can not thus defeat the rights of the diverter."

To deny the right of a public service corporation to make an appropriation independently of its present or future customers, and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and pupose of the United States in its great reclamation projects, for the United States must proceed in making appropriations of water (from the nonnavigable streams of this state at least) as a corporation or individual. Section 4846, Rev. Codes; United States *v.* Burley (C. C.) 172 Fed. 615; Burley *v.* United States, 179 Fed. 1, 102 C. C. A. 429.

It is clearly the public policy of this state to encourage these public

service corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy.

It is impossible to harmonize the decisions of the courts upon the subjects presented. Respectable authority can be found holding contrary to our view; but upon a consideration of our statutes, the history of the law of appropriation, and the public policy of this state, we base our conclusion that, as to a public service corporation, its appropriation is complete when it has fully complied with the statute and has its distributing system completed and is ready and willing to deliver water to users upon demand, and offer to do so. The right thus obtained may be lost by abandonment or nonuser for an unreasonable time, 1 Wiel, sec. 569, but can not be made to depend for its existence in the first instance upon the voluntary acts of third parties —strangers to its undertaking. The appellant here is a public service corporation, State ex rel. Milsted *v.* Butte City W. Co., 18 Mont. 199, 32 L. R. A. 697, 56 Am. St. 575; Gutierres *v.* Albuquerque L. & I. Co., 188 U. S. 545, 23 Sup. Ct. 338, 47 L. ed. 588; 2 Wiel, sec. 1260, as were its immediate predecessors, while the original appropriators of the right claimed by appellant were private individuals.

If our statute does not by express terms, it does by fair implication, require that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. Power *v.* Switzer, 21 Mont. 523; Toohey *v.* Campbell, above; Miles *v.* Butte Electric and Power Co., above; Smith *v.* Duff, above. The law will not encourage any one to play the part of the dog in the manger, and therefore the intention must be bona fide and not a mere afterthought. Nevada County & S. C. Co. *v.* Kidd, 37 Cal. 282.

The appropriator's needs and facilities, if equal, measure the extent of his appropriation. Sayre *v.* Johnson, 33 Mont. 15. If his needs exceed the capacity of his means of diversion, then the capacity of ditch, etc., measures the extent of his right. McDonald *v.* Lannen, 19 Mont. 78. If the capacity of his ditch exceeds his needs, then his needs measure the limit of his appropriation. Toohey *v.* Campbell, above.

We find, then, from this record that, at the time of the initiation of appellant's right in 1892, there was a useful and beneficial purpose to which the water to be appropriated could be applied; that Lee, Hall and Hatch were qualified to make an appropriation; that they had the bona fide intention at the time to apply the water, which they sought to appropriate, to a useful and beneficial purpose; that they posted the required notice at the point of diversion, filed the notice with the county clerk and recorder within the time required by law, commenced the work of constructing the canal by which the water was to be diverted, within the period limited by the statute; that they and their successor, the Holland Irrigation and Canal Company, prosecuted the work with reasonable diligence and completed it by

1895 or 1896, which, considering the magnitude of the undertaking, was within a reasonable time; that the notice posted and the one filed for record claimed more than 2,200 inches; that the canal, when completed, had a carrying capacity of 2,200 inches, or such less amount as the flume mentioned herein would carry if that amount was less than 2,200 inches; that the lands available for irrigation under the canal would require the amount claimed; and that, upon completion, the canal company was in a position to offer, and did offer, the water to actual and prospective users—and these questions are not to be retried. Upon the other questions involved the evidence is too indefinite to enable us to make final disposition of the cause.

Upon the facts stated, our conclusion is that the appropriation was actually completed upon the completion of the canal; that the right related back to the date when the notice was posted; that a valid appropriation of 2,200 inches, or such less amount as the flume would carry, was made; and that this appellant is entitled to a decree for that amount, unless the whole or a portion of the original appropriation has been lost by abandonment or nonuser for an unreasonable length of time.

It appears that the cause was determined upon an erroneous theory and, in justice to all parties concerned, the judgment and order refusing a new trial should be reversed, and the cause remanded for a new trial as to appellant's right as indicated above, and it is accordingly so ordered.

Reversed and remanded.[37]

Brantly, C. J., and Smith, J., concur.

INYO CONSOLIDATED WATER CO. *v.* JESS ET AL.

1911. SUPREME COURT OF CALIFORNIA

161 *Cal.* 516, 119 *Pac.* 934

SHAW, J.: The court below sustained a general demurrer to the second amended complaint. Plaintiff refused to amend further. Thereupon judgment was given for defendants. Plaintiff appeals.

The first count of the complaint purports to allege a cause of action, under section 738 of the Code of Civil Procedure, to determine the alleged conflicting claims of the plaintiff and defendants, respectively, to the right to use the waters of Cottonwood creek, in Inyo county, and to the right to divert such waters for use. The complaint alleges that the city of Los Angeles has a prior right to divert

[37] See Thorp et ux. *v.* McBride, 75 Wash. 466, 135 Pac. 228, supra, p. 227; Windsor Reservoir and Canal Co. *v.* Lake Supply Co., 44 Colo. 214, 98 Pac. 729; Claypool *v.* O'Neill, 65 Ore. 511, 133 Pac. 349, p. 280, supra; Farmers' Co-Operative Ditch Co. *v.* Riverside Irrigation District, 14 Idaho 450, 94 Pac. 761, 763.

and use 180 miner's inches of said waters. The alleged conflicting claims do not relate to that water, but solely to the excess of the stream above that quantity. It appears from the briefs that the demurrer to this count was sustained upon the theory that it does not show that the plaintiff owns or possesses any subsisting interest in, or right to, the water or the use thereof. This constitutes the question to be determined.

The plaintiff claims its right under and by virtue of five notices of appropriation posted and recorded by George Chaffey, as provided in section 1416 of the Civil Code. Plaintiff has succeeded to Chaffey's rights. Two of the notices were posted on June 24, 1905; the other three on July 31, 1905. The notices state, and the fact is, that the places of intended diversion, and part of the route of the conduit to be constructed to convey it to the place of use, are and then were within the Sierra forest reserve of the United States. No diversion works or dams had been built or begun in pursuance of the notices, or either of them, at the time the action was commenced, which was on July 16, 1907. In excuse for this delay the plaintiff relies on the extensions of time to begin that work given by section 1422 of the Civil Code, and by the amendment of March 21, 1907, to said section 1416. The amendment took effect on May 20, 1907, Stat. 1907, p. 780.

Section 1416, as it stood prior to 1907, provides that a claimant must begin the diversion works within sixty days after the notice is posted and diligently pursue the same to completion. There are certain exceptions not necessary here to notice. By section 1419 a failure to comply with this requirement forfeits claimant's right, as against a subsequent claimant who does comply. Section 1422, in effect, is that if the fact is, and the notice so states, that the proposed place of diversion or any part of the diverting canal is within a forest reserve or other United States government reservation of public land, the claimant may commence the diversion works within sixty days after he shall have received a grant of license from the proper public officers to occupy and use such reserved lands for that purpose, provided that, within sixty days after the posting of the notice of appropriation, he shall have begun the necessary surveys required to precede the application for such license, and shall have diligently prosecuted such surveys to completion, and, upon such completion, shall have also applied to the proper officer for such license and prosecuted such application with reasonable diligence. Facts are alleged showing that the provisions of this section have been fully complied with, and that the applications for said licenses or grants of authority to occupy and use said reserved lands are now being considered by the officers of the United States authorized to make such grants, but that they have not yet been determined, and, consequently, that plaintiff is unable to proceed with said diversion works.

The effect is that plaintiff is relieved from the requirement of sections 1416 and 1419 that such works must be commenced within sixty days after the posting of the notices of appropriation in order to pre-

serve the claimant's statutory rights under the notice. As to these claims, the time limited has been extended and has not yet expired. The plaintiff's rights to begin and complete the diversion works are the same as they would be if the original sixty days had not expired. His present right to maintain this action is also the same.

Respondents contend that this right is not a vested right, that it is not property, and that it can not be protected against adverse claimants by a suit to determine conflicting claims. In this behalf they cite Kelly *v.* Natoma Water Co., 6 Cal. 105; Maeris *v.* Bicknell, 7 Cal. 261, 68 Am. Dec. 257; Kimball *v.* Gearhart, 12 Cal. 50; Nevada, etc., Co. *v.* Kidd, 37 Cal. 309; and Mitchell *v.* Amador, etc., Co., 75 Cal. 482. These cases all involve water rights existing prior to the enactment of the Code in 1872, prescribing a statutory mode of acquiring a right to the use of running water. They lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same to completion.

Thus, in Nevada, etc., Co. *v.* Kidd, supra, on page 310, referring to such an embryo claim to water and to a hostile use before its completion, the court says: "There is, in fact, as yet, no present water right to be affected. The party has merely acquired the possession and site for his dam and canal, and a right, by diligently pursuing his object, to acquire a future right to the possession of the water, which, when acquired, shall, for the purposes of priority and of redressing any injuries that may thereafter accrue, date by relation from the first act in selecting the location and making the claim." Such claimant had no immediate right to the control or use of the water, because he was not yet ready to take it. And he had no right to damages from any one who used the water while he was making his dam and ditch. It does not follow, from this, that he had no right at all. On the contrary, it was declared that as soon as he began work on his dam and ditch, with the avowed intent thereby to take and use the water, he acquired a prior right respecting the water. In Maeris *v.* Bicknell, supra, the facts were that plaintiffs' grantors, not intending to use the water, but for the purpose of draining it away from their mining claims, had constructed a ditch, which carried the water away, but they had made no actual use of it. Meantime, defendants diverted the water above plaintiffs' ditch and had used it. The court said: "Unless the grantors of plaintiff had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it, or intended so to apply it. If, at the time plaintiffs' ditch was made, such

intention had existed and been avowed, and afterwards carried out in good faith within a reasonable time, considering all the circumstances, then defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiff." There is no case, arising prior to the enactment of the Code, which holds that the party who, thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water, against the hostile diversions and claims of others, by an appropriate suit for that purpose. It is obvious that this could not be so. Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual use; the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of these conditions, his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works. It would be clearly a property right, and, it being incidental and appurtenant to land, it was real property. Civ. Code, sec. 658.

The purpose of the Code was to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open visible work to that end, upon the ground, accompanied by a declaration of the intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The Code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of sixty days thereafter. Wells v. Mantes, 99 Cal. 586. Thus there is given that which it is said did not exist before, Kelly *v.* Natoma Water Co., supra, a constructive right to the use of the water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within sixty days, diligently prosecuting it to completion, and thereupon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty. Under section 738, Code of Civil Procedure, the person who has an interest in real property may maintain an action to determine the validity of a conflicting claim which is adverse to his own claim. It follows that the first count states a cause of action and that the general demurrer thereto should have been overruled.

* * * * * * *

The judgment is reversed.[38]

We concur: Angellotti, J.; Sloss, J,; Melvin, J.; Henshaw, J.; Lorigan, J.

[38] See Conley *v.* Dyer, 43 Colo. 22, 95 Pac. 304; Sullivan *v.* Jones, 13 Ariz. 229, 108 Pac. 476.

STATUTORY SYSTEMS OF ADMINISTRATION OF WATER RIGHTS

The legislation in the several western states concerning the method of acquisition and the extent of water rights, administrative supervision and control of water uses, and the adjustment and determination of priorities, varies from a few scattered provisions to an elaborate statutory system following constitutional declarations of policy. The tendency has been strong towards the general adoption of the ideas underlying the Wyoming system, however, and it seems certain that ultimately all the states where irrigation is of great importance, will have comprehensive legislation based upon these ideas.

In its most comprehensive form, the so-called Wyoming scheme includes the following main provisions:

(1) That an inventory with proper maps, etc., be made of the capacity of the natural water resources of the state; or at least a determination made of the capacity of the particular sources of supply in which water rights are sought. That this be done under the direction of a state engineer or of a water board or commission.

(2) That all appropriations be initiated by formal application to the state engineer or to the water commissioners and that these applications contain certain specified information.

(3) That the state engineer or water commissioners may order amendments, etc., to the application and, after hearing, etc., shall reject or approve the application and, if they approve it, shall designate a definite reasonable time within which the work of appropriation shall be completed.

(4) That upon satisfactory completion of the work of appropriation, a certificate or permit of appropriation be issued.

(5) That the extent of the appropriation be fixed by these proceedings before the state engineer or water commissioners, that its priority date back to the time of application, and that the permits be numbered in sequence accordingly.

(6) Provision for maintaining a record of appropriations.

(7) Provisions for proceedings to adjudicate and settle as a matter of record the existence and relative priority of all water rights in any source of supply. These proceedings are to be initiated before the state engineer or water commissioners with a right of recourse to the courts if this determination is not satisfactory to the claimants; or they are to be started before a court in the first instance.

(8) Provisions that the point of diversion, place of use, or nature of use shall not be changed without previous application to the state engineer, water commissioner, or a court, a hearing thereon, and a determination that no detriment will result to uses under other priorities. But see Wyoming Comp. Laws 1910, sec. 724.

(9) Provisions for the division of the state into water districts for local administrative purposes and for local subordinate officers

to supervise the diversion and distribution of water from the natural sources of supply in accordance with the established priorities.

Not all these provisions have been enacted in all the states, even in those where there has been extensive legislation concerning water rights. Furthermore in all these states there are provisions other than these nine. Naturally there is quite a little variety in the details of the legislation.

For further information on this matter see Wiel on Water Rights, secs. 124-125, 408-423, 1183-1235, 1428-1470.

Section 3.—Ditch Rights and Water Rights. Relative Rights of Diverters, Carriers and Users

ROMINGER *v.* SQUIRES

1886. SUPREME COURT OF COLORADO

9 Colo. 327, 12 Pac. 213

ELBERT, J.: We have carefully examined and considered the evidence in this case, and are of the opinion that it does not warrant the decree rendered. The three owners of what is called the "Saalfeldt Ditch," and the four owners of what is called the "Wittmayer Ditch," entered into a contract in 1874 to construct what is called the "New Ditch," which was to supersede, either in whole or in part the two old ditches as a water-way, by means of which their respective lands were to be irrigated. The terms and extent of this contract were the leading questions in the trial below. The court found, in substance, that it was an agreement that each of the parties to the contract (except Zeibig) was to own one-seventh of the ditch, and one-seventh of the water to be conveyed through it. Zeibig, as representing two water-rights in the old ditches, was to have two-sevenths in the new ditch, and two-sevenths of the water. This view of the agreement was the basis of the decree adjusting the rights of the plaintiff and defendant, who held as grantees of parties to the agreement. This finding is undoubtedly correct as to the rights the respective parties were to have in the new ditch, as a water-way. With respect to the division of water, however, we think it plainly against the weight of evidence. The weight of evidence is to the effect that nothing was said, in the agreement to construct the new ditch, about the division of the water; that each party was to bring through the new ditch the water which he claimed to have theretofore appropriated and used in the old ditches; that, while the agreement provided for a change of the water-way, it in nowise contemplated or provided for a change of water-rights. Having reference to their rights in the old ditches, the

evidence shows priority of appropriation on the part of several of the original constructors of the new ditch, and, among others, Saalfeldt, the grantor of the defendant, Rominger. Water rights in this state, where agriculture is almost exclusively carried on by means of irrigation, are valuable properties. In this case the stream from which the water was taken was small, and a scarcity of water therein for the purpose of irrigation was by no means an improbable contingency. It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will be lightly sacrificed or surrendered by its owner. Nor should the owner of such a right be held to have surrendered it or merged it except upon reasonably clear and satisfactory evidence. The evidence in this case, in our opinion, is not such as to warrant the finding of the court upon this point, in view of the testimony of nearly all the original constructors of the new ditch, to the effect that nothing whatever was said about the water in the agreement concerning the new ditch.

The finding of the court that the appropriations of water by the different parties were to be referred to the same date could only have been based upon the proposition that priorities had been waived by the contract respecting the new ditch. The evidence, as before said, shows a prior right, by "diversion and conversion to a beneficial use," in several parties to the contract. The finding of the court upon this point is unsupported.

It follows that the decree, based upon these two erroneous findings, did not properly adjust and determine the respective rights and equities of the plaintiff and defendant in this case. (1) In the view we have taken of the evidence, one-seventh is not the measure of the quantity of water to which each one is entitled. (2) If it be conceded that the water right of Zeibig, owned by the plaintiff, is of equal date with the water right of Saalfeldt, owned by the defendant, we think it clear, as the evidence now stands, that the water right which the plaintiff claims in connection with the Volk ranch was a later appropriation of water, and must be postponed in favor of defendant's earlier appropriation.

There is nothing in the claim made by counsel for appellee that the plaintiff, Squires, was entitled by reason of five years' adverse possession. There is no such claim set up by the pleadings, nor did the testimony show any adverse possession such as is contemplated by the rule which counsel invoke.

The evidence before us is not sufficiently full and explicit to enable us to direct a decree determining the priorities of the parties, and the amount of water to which each one is entitled, either in this case, or in the case of Rominger *v.* Bugh, 9 Colo. 330, which, by agreement, is to be considered and determined upon the same evidence.

The decree of the court below will be reversed, and the cause remanded for a new trial upon the issues made by the pleadings.[39]

[39] See Carnes *v.* Dalton, 55 Ore. 596, 110 Pac. 170; Meagher *v.* Hardenbrook, 11 Mont. 385, 28 Pac. 451, p. 252, supra.

ARROYO DITCH AND WATER CO. *v.* DORMAN ET AL.

1902. SUPREME COURT OF CALIFORNIA

137 Cal. 611, 70 Pac. 737

PER CURIAM: This action was brought to quiet title to the Arroyo ditch and to the waters diverted thereby from the Old San Gabriel river, in Los Angeles county, and for an injunction to restrain defendants from interfering with said waters. The court, by its findings and decree, determined, in effect, that the defendants and plaintiff were tenants in common in the ditch and water involved in the suit, and, after setting out the rights and titles of the several parties in and to the property, decreed "that a permanent writ of injunction issue from this court directed to the defendants, and each of them, and the plaintiff, his and its successors in interest, agents and servants, requiring them, and each of them, to perpetually refrain from taking or diverting any greater portion of the said water than herein specifically adjudged to belong to him, her or it." The defendants appeal from the judgment and from an order denying them a new trial.

The Arroyo ditch has its head in the Old San Gabriel river, and conducts water from that stream for the irrigation of and domestic use upon some 3,950 acres of the Rancho Santa Gertrudes. This rancho has been divided up and sold out in small parcels of a few acres each, until, at the time of the commencement of this suit, it seems that the twelve defendants herein owned each a several tract thereof, which several tracts amounted in the aggregate to 622 acres. At the same time the stockholders of the plaintiff corporation owned 3,328 acres of said rancho, each stockholder owning a small tract thereof. The Arroyo ditch was constructed in 1869, and furnished water to the entire 3,950 acres of land constituting the aggregate acreage of all the parties interested in this suit. In 1885 the owners of the numerous tracts of land already referred to, consisting of upwards of 150 people, owned interests in the ditch and in the water diverted thereby as appurtenant to their land, each person's interest corresponding to the acreage of his land as compared to the whole acreage watered by the ditch. In said year 1885 the great majority of the owners in said lands, ditch and water concluded to form a corporation for the control, management and distribution of said waters, and accordingly they entered into a contract to that end, and the corporation plaintiff was thereupon duly formed. About 150 of the said owners received stock from the corporation, each person receiving as many shares as he had acres of land. And thereafter the corporation at once entered upon and continued in the control and management and distribution of the waters of said ditch to the extent that its stockholders were interested therein. The defendants

did not become stockholders, and took no interest in said corporation. In 1898 this suit was commenced by the corporation to quiet title to the ditch and to the water, and to restrain a threatened interference with the water on the part of defendants. The court found, in substance, that the plaintiff was the owner of 3328/3950 of said ditch and water right, and that defendants were the owners of the remaining 622/3950 thereof, specifying the particular fractional interest that each defendant had in the property. In addition to this, the court found and decreed as follows: "Except that, if the said proportion of said water herein found to belong to any one of the defendants should at any time be in excess of what is reasonably required by such defendants for domestic use and for irrigation of the land owned by him or her at the commencement of this action, then and in that case or cases such excess does and shall belong to the plaintiff." This last finding is inconsistent with the evidence, with the other findings, and with itself. How can property be said to belong to and be owned by a person, if, when that person does not need it, it must belong to some other person? If defendants own a specific amount of water,—as the evidence and findings clearly indicate that they do,—they should be made secure in that interest by the decree of the court; and their rights in property which is confessedly theirs should not be left contingent upon their future needs. If they should not need it in the future, they may possibly want to exchange it for something that they do need. It being their property, the decree should be so framed as to permit them to do as they please with their own. The evidence discloses, and the probative facts found by the court show, that the parties to this suit are tenants in common of the ditch and water rights involved, each one having a fractional share corresponding to the acreage of land which she, he or it represents. There is nothing in the case to show that any one of these tenants in common has any reversionary rights or title of any kind to the interest of any of the other tenants. The decree should be amended so as to cure the error hereinbefore pointed out.

Whether the corporation plaintiff has succeeded to the title of its stockholders in this property, or shall be regarded merely as an agency of said stockholders for the management and control of their several interests, is a matter of no importance to appellants. As long as appellants' rights are fully protected,—as we think they will be by an amendment of the decree,—the disposition of other rights in the property is, as to appellants, entirely immaterial. We do not interpret the decree in its present form as giving the corporation control over any of the water to which defendants are entitled, except at a time when defendants may not need their water for use upon their lands. It is likewise, and for the same reason, immaterial to defendants whether the corporation has been in control of the water continuously, or whether it takes water from one point or another on the ditch. So long as defendants get the water to which they are entitled, they can ask for nothing more in the premises.

The other errors complained of by appellants are not regarded of sufficient importance to require special notice.

The court below is directed to amend the judgment by striking from it the exception as to the excess of waters reasonably required by defendants, hereinabove quoted, and it is ordered that the decree as thus amended shall stand affirmed, and the order denying a new trial is also affirmed.[40]

THE CACHE LA POUDRE IRRIGATING CO. *v.* THE LARIMER AND WELD RESERVOIR CO.

1898. SUPREME COURT OF COLORADO

25 *Colo.* 144, 53 *Pac.* 318, 71 *Am. St.* 123

CAMPBELL, C. J.: This is a writ of error to a judgment of the Court of Appeals reversing the judgment of the district court. To this action, as tried below, there were several defendants; the causes of action alleged against those not appearing upon the review in either appellate court being entirely distinct and separate from that averred against the present defendant in error, which was plaintiff in error in the Court of Appeals, and a defendant below. The grievance against this defendant is that in buying a water right separate from the land, and transfering the place of use to other lands, the subsequent use was thereby enlarged, to plaintiff's injury. In its decree the district court enjoined the defendant from using, in times of scarcity, a certain quantity of the water thus sought to be transfered, until the plaintiff's priority was satisfied, but refused to restrain it in the use of a certain other quantity thereof, which relief the plaintiff also asked. In the Court of Appeals the defendant, as plaintiff in error there, assigned as error the granting of the injunction; and the plaintiff, as defendant in error, assigned cross errors to the refusal of the district court to give all the relief prayed. Upon a hearing in the Court of Appeals the decree was reversed, no relief being awarded to plaintiff, and the injunction theretofore granted was dissolved. 8 Colo. App. 237.

The theory upon which this case was tried by the plaintiff is that no transfer of the right to use water for irrigation can be made, or the place of such use changed, to the injury of junior appropriators. While in the pleading it might be inferred that reliance was had upon an abandonment, there is nothing in the evidence to show any subsequent appropriation by plaintiff of the abandoned right, even if such had resulted. With much of plaintiff's argument no fault can be

[40] See Calkins *v.* Sorosis Fruit Co., 150 Cal. 426, 88 Pac. 1094. Compare Meagher *v.* Hardenbrook, 11 Mont. 385, 28 Pac. 451, p. 252, supra.

found, and, if the proof sustained the allegations of its pleadings, the relief prayed for should be awarded. The undisputed facts are that the Jackson ditch has a decreed appropriation under its first two priorities of twenty-six and one-twelfth cubic feet; antedating any appropriation of the plaintiff's ditch, called "Greeley Canal No. 2," whose first two priorities of 280 cubic feet are junior to either of the defendant's. The owners of the Jackson ditch and its priorities owned them as tenants in common, and were consumers of the water thereby carried; and they organized a corporation called the Dry Creek Ditch Company (what is commonly known as a "mutual ditch company"), to which they conveyed the ditch and the water rights; the company issuing to the several owners capital stock representing ownership in the ditch, and the quantity of water which they were entitled to use. There were twenty-four shares of stock issued. Of these, the defendant company, long after the water had been beneficially used, bought three and one-fourth shares from Terry, Black and Alford, water consumers under the Jackson ditch, and stored the water thereby represented in its reservoir, and thence distributed it during the later irrigation season to its stockholders, who used it for irrigating lands belonging to them, and lying under their ditch. It will be seen that the water was thus severed from the land on which it was originally used, and applied for the purpose of irrigating other lands. The plaintiff charges that no priority was sold by the sale of ditch stock, and, if it was, then such transfer and change of use have resulted in an enlarged use of water, to plaintiff's injury.

In the first place, it is said that the Jackson ditch, its capital stock, and priority to the use of water thereby carried, are three separate and distinct things; the ditch belonging to the corporation, the priority to the water consumers, while the stock may be held by persons not using water. Upon this, as a premise, the argument is that the corporation can not transfer a priority,—only the water consumer may do this. The sale of ditch stock is not the sale of a priority. To transfer this, the water consumer must also sell the land upon which the water has been used, or, if he retains the land, and sells the water right, to be applied on other lands, such right passes to the grantee, and the grantor no longer can irrigate the land retained by means of the water right thus conveyed to another. The conclusion drawn is that in the sale of ditch stock to this defendant no priority passed, and reliance is had on Combs *v.* Ditch Co., 17 Colo. 146. The premise, as laid down, may be true in whole or in part, or it may be entirely false. A ditch company, organized merely as a carrier of water to those owning the appropriation, may, as a corporation, own the physical or tangible ditch. Its stock may be in the hands of A and B, and the consumers of water may be C and D, and the transfer of the capital stock of the company may carry only an interest in the ditch. But where, as in the case at bar, the water rights, and the ditch through which they are enjoyed, are owned by the same persons, as tenants in common, and for their mutual convenience they organize

a corporation, and convey to it the ditch and water rights, and the corporation issues to the consumers its capital stock, which represents and stands for, not only the rights of the parties in the ditch, but, by a mutual arrangement, also represent the right to the use of water (or the priority right), then this stock (while not, of course, constituting the ditch, or priority to the use of water) does represent both the ditch and that priority, and a transfer of the stock operates as a transfer of both kinds of property. So that all of the plaintiff's argument, that nothing was transfered by the purchase from water consumers of the capital stock of the ditch company, and all the distinctions sought to be drawn between ditch stock, the ditch and the priority to the use of water, are wholly inapplicable to the facts of this case. There is nothing decided in the Combs case that is against this conclusion, and the facts of that case called for no ruling upon the question here raised. Notwithstanding the decision of this court in Strickler *v.* City of Colorado Springs, 16 Colo. 61, that there may be a sale of a water right, separate from the land, and an application of the water to other lands, so long as the rights of others are not infringed, plaintiff persists in the contention that its conclusion is unsound. Much of the argument might be pertinent, were the doctrine of that case an open question; but not only in this state, but in all others in which the system of appropriation prevails, the same result has been reached where the question has been raised. With the conclusion reached in that case, we are content. See, also, Fabian *v.* Collins, 2 Mont. 510, and Frank *v.* Hicks, 4 Wyo. 502. The only question of importance, then, in this record, is, have the transfer of priority, and the change of the place of use, injuriously affected the later appropriator? If not, plaintiff may not be heard to complain. If so, it is entitled to relief. The finding of the trial court was that, as to the one and three-fourths shares of stock bought of Black and Terry, who were stockholders and consumers of water under the Jackson ditch, the transfer has not resulted in any injury to the plaintiff, but that, as to the two shares bought of Alford, such transfer and subsequent use by defendant have resulted in an enlarged use of water, above that made by the consumers under the Jackson ditch prior to the transfer. As to the former part of the ruling, in which the Court of Appeals concurs, we think the district court clearly right, and this disposes of the cross errors assigned by the plaintiff.

With much force, the plaintiff attacks the decision of the Court of Appeals reversing the second part of the finding, and strenuously insists that the evidence abundantly sustains the finding of the trial court as to the Alford stock. To a consideration of this proposition we now address ourselves. In the opinion and findings of the learned district judge it is said that the water represented by the Alford stock had not been used for some time previous to its transfer,—at least, to the extent that it has since been used; that no lands lying under the canal of the company whose stock was sold had ceased

to be irrigated; and that the demands upon the supply of water in the river were greater, and were increased by reason of the transfer, and the enlarged use of water therefrom. If the evidence sustains this finding, or if there is any legal and competent evidence upon which it can be justified, although there is a serious conflict in the evidence, and in our view its weight is against the finding, it ought to be upheld, under the general rule of this court so often announced. Considering the important principle involved, the property interests of the litigants, and the respect due to findings of a trial court, we have closely scrutinized the evidence upon this point. The conclusion reached, that the plaintiff was injured, seems to have been predicated upon two separate facts: First, that the water represented by the Alford shares had not for some time previous to the transfer been used,—at least, to the same extent as it was thereafter; and, second, that after the transfer no lands ceased to be irrigated under the Jackson ditch. Therefore the demands upon the supply of water from the river were greater, and have been increased, by reason of the transfer. The uncontroverted facts are that prior to 1880, when Alford bought the stock, the water had all been continuously used in irrigating land of its then owners. When he bought, his intention was to use a portion of the water on school lands; but, being unable to lease them, such use was never had. Therefore, after his purchase, and up to the time he sold to the defendant, all this water was used, sometimes in irrigating land that he himself owned, lying under the Jackson ditch; sometimes by his tenants, or by those who worked or paid the assessments levied upon the stock; and, when not so used, through a mutual arrangement, was employed by the other stockholders in irrigating their lands under the Jackson ditch. Alford testifies that he never intended to abandon his rights, and never did, and that there was no interruption in the use of the water as aforesaid. The evidence is uncontroverted, that, in times of scarcity, there was not enough water in the Jackson ditch to irrigate all the lands of the stockholders lying under it, but that its decreed priority, to its full extent, and at all times when available, had been used by the several owners, and when one did not, for any reason, need all his pro rata share, the other tenants in common beneficially applied what was not so needed. It is to be observed that, under these adjudications awarding priorities, the decreed priority attaches to the ditch, and a certain quantity of water is decreed to it, and no attempt is made to designate the person or persons who are the owners of the priority, or what proportion belongs to each; and, indeed, the statute contains no warrant for determining the ownership of the ditch, or the relative rights of the water consumers thereunder. In so far as concerns the rights of junior appropriators who were parties to the proceeding, the quantity of water awarded to the Jackson ditch is res adjudicata. Its owners might, and in this case did, apportion the water among themselves. White *v.* Reservoir Co., 22 Colo. 191. They could not waste it, or divert more than

their necessities required; but junior appropriators are not concerned with the method of apportionment adopted by those entitled to its use, so long as the latter had a necessity for it, and actually used it, and diverted no more than the decreed priority. If one consumer did not need or use all that his stock entitled him to, or if, by sale of a portion of his lands, his necessity was less, or, as expressed by counsel, if he owned more water than land, he might lawfully sell the excess of water, or lease it, or permit his co-tenants to use it, before any subsequent appropriation attached thereto; and of this junior appropriators may not complain. One tenant in common may preserve the entire estate held in common. This doctrine is applicable where the common estate is a water right, so long as the tenant in common has both the necessity for the use, and actually uses the water for a beneficial purpose. The extent to which the right may be preserved, of course, depends upon the amount so used, coupled with the necessity. Meagher *v.* Hardenbrook, 11 Mont. 385.

Under the conceded facts, the use of the water represented by the Alford stock previous to the transfer to the defendant was such as that no abandonment or loss of the right occurred. The fact that it was not at all times, and to its full extent, used by Alford himself, but that it was at such times used by lessees, or by his tenants in common, preserved intact the right to the full quantity represented by the shares held by him. But the finding—in form, a finding of fact—is that this transfer has resulted in an "enlarged" use. There is not a word of direct evidence that more water is now turned into the Jackson ditch from the river than before the transfer. We have seen that its decreed priority attaches to the ditch itself, and that, if the quantity decreed is beneficially applied, it is immaterial to plaintiff, as a junior appropriator, whether it is upon the lands of the several owners in exactly their pro rata shares, or in accordance with some other method mutually satisfactory. But the court seems to have concluded that an enlarged use necessarily resulted from the mere fact that practically the same number of acres of land lying under the Jackson ditch are now irrigated as before the transfer; and, in addition to this, the defendant, with the purchased water right, irrigates a large tract of land,—how much, the evidence fails to show. In other words, the court below, assuming it as a necessary deduction from the fact that more land was irrigated after than before the transfer, held that thereby there was an enlarged use. An "enlarged use" may mean that more land is being irrigated with the same quantity of water that formerly was employed in irrigating fewer acres. It does not necessarily imply that a greater volume is required. It seems to us that if, as a matter of fact, a greater quantity of water is actually so used, the best evidence would be testimony that more water was now being diverted into the ditch. Certainly, evidence that more water is now turned into the headgate of the Jackson ditch would be more satis-

factory proof of injury to plaintiff than the inference to be drawn from the mere fact that more land was being irrigated. Suppose there had been no transfer of this stock, and the original stockholders had increased their acreage; would plaintiff necessarily, or at all, be injured, if the aggregate quantity of water diverted into the Jackson ditch was no greater than before cultivating the additional land? Might not the same quantity be used, through more economical methods of spreading the water, or possibly by not so complete saturation? Suppose, again, that defendant had bought all the rights of priority attaching to the Jackson ditch; could it not change the place of use, and even apply the water to 1,000 acres more land than the former owners irrigated, provided no greater amount of water was taken from the river than before the transfer? The only specific evidence is that no more water is now being diverted than before, and that is by no means overcome by an inference of enlarged use, drawn from an increased acreage. In other words, the finding by the court that there was an enlarged use is not only not one of fact, but an unwarrantable conclusion or deduction from facts which are attended by no such consequences. To say the least, in the absence from this record of evidence as to other essential elements entering into the problem, it is impossible to determine from the evidence before the court that a greater quantity of water is now diverted through the Jackson ditch to irrigate the lands of the present stockholders than was taken before the defendant acquired its stock; and if only the same quantity is diverted, plaintiff suffers no injury. There is no other evidence than this, relating to the nonuse of water by Alford himself, and as to the acreage now and heretofore irrigated, to show a larger diversion of water. True, in answer to hypothetical questions (not proper questions, because based in part upon no evidence in the case), certain opinions, in the nature of legal conclusions, were given by several witnesses, to the effect that plaintiff was injured by the transfer; but we are to determine this from the facts, and not from opinions of witnesses. In any event, the evidence signally fails to show that since the transfer the Jackson ditch has diverted more than its decreed priority, or more than it did before the transfer, or that any greater demand upon the waters of the stream is made by the defendant than was previously made by Alford and his co-tenants.

From the foregoing, our conclusion is that the finding below, that plaintiff has been injured, has no substantial foundation in the facts of this case. The nonuse by Alford of all the water he was entitled to, when it is considered that he had no intention to waive any right, and that he and his co-tenants did use all the water his shares represented, worked no abandonment of his rights. The mere fact that since the transfer a greater acreage has been irrigated, by the decreed priority of the Jackson ditch, than before, does not establish a greater diversion. Greater economy in use, or less thorough irrigation, or difference in soil as to absorbing quality, may

account for that, especially when there is no direct evidence at all that more water has been diverted from the river into this ditch, and there is positive evidence that no greater volume has been diverted since the change of place of use. The evidence as to increased acreage is not of itself sufficient to establish that an enlarged use of water has been occasioned by the transfer. The judgment of the Court of Appeals is affirmed, with instructions to remand the case, with directions to the district court to affirm its judgment as to the Black and Terry stock, and to reverse it as to the Alford shares, and, if further proceedings be had, that they conform to this opinion. Affirmed.

McCRARY *v.* BEAUDRY

1885. SUPREME COURT OF CALIFORNIA. DEPARTMENT 2

67 Cal. 120, 7 Pac. 264

SHARPSTEIN, J.: This is an appeal from a judgment that a writ of mandate issue as prayed in the affidavit of plaintiff. The affidavit was properly treated as a complaint, which was demurred to by defendant on several grounds, the principal one of which is that it did not state facts sufficient to constitute a cause of action. The complaint shows with reasonable certainty that the defendant obtained from the city of Los Angeles permission to lay water-pipes in the streets of said city, for the conveyance of water for his use and that of the citizens residing in what is known as "the hilly section" of said city, "to whom he might sell or give water." That after obtaining such permission, the defendant laid pipes in said streets and through them conducted water to said section, which he sold to the residents of said section, of whom the plaintiff was one, at certain monthly rates, which the plaintiff paid until November, 1884, when the defendant, without any valid excuse for so doing, shut the water off from the plaintiff's premises and refused to turn it on again. Appellant insists that the facts alleged are not sufficient to impose on him any duty or obligation to furnish the respondent with water.

It appears sufficiently clear that appellant had appropriated water for distribution and sale, and that he had acquired and was exercising the right to collect rates from the inhabitants of the city of Los Angeles for the use of it; and the use of all water appropriated for sale, rental, or distribution is declared by the constitution to be a public use; and the right to collect rates or compensation for the use of water by the inhabitants of any city is a franchise which can not be exercised except by authority of and in the manner prescribed by law. Const. art. 14. Whenever water is ap-

propriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner. Water appropriated for distribution and sale is, ipso facto, devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.

In one part of the affidavit it is stated that affiant "has been paying the said Beaudry for said water at the regular rates established and demanded of affiant by said Beaudry," and in another "that affiant has been paying said V. Beaudry for water for use on said premises for domestic and irrigating purposes during the eight months last past at the rate of $2.25 per month, and affiant alleges that he has been at all times, and is now, ready and willing to pay to said V. Beaudry the sum of money fixed as the established rate for use of water on said premises, which he alleges was, and is now, the sum tendered as aforesaid, to wit, the sum of $2.25 per month; and that no greater sum has been, nor is now, demanded by said Beaudry for the use of water on said premises for domestic use and irrigating purposes." Reading the two paragraphs together it appears that the rate established by appellant for supplying respondent with water was $2.25 per month, which he paid as long as he was supplied with water, and has at all times since been ready and willing to pay.

The facts alleged in the complaint show to our satisfaction that the appellant was in the exercise of a franchise which he could not exercise except by authority of and in the manner prescribed by law, and that the law enjoined on him the duty, resulting from that trust, of furnishing the respondent with water. The writ was issued, according to the requirement of the Code, upon the affidavit of respondent, the party beneficially interested; and such affidavit was as valid and effectual without the title of the action or proceeding in which it was made, "for any purpose, as if duly entitled." Code Civil Proc. sec. 1046.

The affidavit in a case like this may be treated as a complaint, and still remain an affidavit to all intents and purposes. We think the demurrer was properly overruled.

Judgment affirmed.[41]

We concur: Myrick, J.; Thornton, J.

[41] See Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. 275; Cal. Civ. Code § 324.

HILDRETH *v.* MONTECITO WATER CO.

1903. SUPREME COURT OF CALIFORNIA

139 Cal. 22, 72 Pac. 395

SHAW, J.: These appeals arise out of the same action. No. 1113 is an appeal by the defendant from an order refusing to dissolve a preliminary injunction, and No. 1256 is an appeal by the defendant from the final judgment, taken within sixty days after its rendition, and presenting as the record on appeal the judgment roll and a bill of exceptions containing the evidence. The two appeals will be considered together.

The sufficiency of the complaint is attacked by a general demurrer and by the motion to dissolve the injunction. The complaint does not state facts sufficient to constitute a cause of action. The purpose of the action is shown by the prayer, which is that the defendant be enjoined from shutting off from the plaintiff's premises the water supply from Hot Springs creek theretofore used thereon, and from interfering with the flow thereof to, and the use thereof on, the said premises. The plaintiff, in his complaint, does not claim any ownership of or title to the water of the creek in himself or as appurtenant to the land. The theory upon which the complaint is drawn is that the water has been appropriated and dedicated to public use; that plaintiff, as a beneficiary of the use, has been receiving a due proportion of the water for use on the premises; that defendant is in charge of this public use, and is, therefore, bound to continue to supply the water for use on the premises upon payment or tender of the rates established therefor.

It must be admitted that a person, natural or corporate, can not be said to be in charge of the administration of a public use of water, unless such person either owns or controls some water which is the subject of the use. And if one claiming to be a beneficiary of the use asks the court to protect him in its enjoyment against a person claimed to be in charge of the use, he must show in his complaint that such person has the ownership or control of water which is the subject of the use; otherwise there can be no cause of action. There is no direct decision in this state on the precise question, but it was recognized as one of the fundamental conditions of such liability in Price *v.* Riverside, etc., Co., 56 Cal. 431. In that case the court, speaking of corporations organized for the distribution of water for public use, says that every such corporation "has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class" for whose benefit the use was created. But the proposition is fundamental, and needs no authority or discussion to support it. It is evident from an examination of the complaint that it was carefully and skillfully drawn so

as to avoid the statement of this fact. After alleging the ownership by the plaintiff, as trustee, of three and one-half acres of land situated in "the Montecito," and known as the "Lorenzana Place," it alleges the right of the plaintiff and the liability of the defendant as follows:

"(2) That the defendant is a corporation organized under the laws of the state of California, and is the owner of and in the possession, management and control of a system of water-works and water pipes constructed and laid in said Montecito for the public distribution and use in said Montecito of the water of the Hot Springs creek, and by means of which water-works and pipes the said waters of Hot Springs creek have been appropriated and dedicated to public use as aforesaid.

"(3) That for many years the premises of plaintiff aforesaid have been supplied with water from said * * * creek for [certain uses], by said defendant by means of its water-works and pipes aforesaid, * * * at the rate of one dollar per month; * * * that plaintiff has paid the said water rates as demanded by said company for such water supply for said premises to and including the month of February, 1901; * * * and that plaintiff is willing, ready and able to pay for said supply to said premises as the same may be or may become due," and desires to have the supply continued.

Allegations follow to the effect that in February, 1901, defendant gave notice to plaintiff of its intention to shut off "from said premises the supply of water heretofore furnished by defendant as aforesaid;" that defendant intends to, and will, unless restrained, cease to supply water to the premises; that plaintiff has no other means of supply, and will suffer irreparable damage.

It will be observed that while these paragraphs explicitly aver ownership and control by the defendant of a system of water-works, they do not state that the defendant owns, controls, or has the right to control the waters of Hot Springs creek, or any other water. And although it is averred that by means of these water-works the waters of the creek have been appropriated and dedicated to public use, it is not stated that this appropriation or dedication was made by the defendant, nor that the waters still remain subject to such use. For all that appears in the complaint, some other person may at all times have been the owner and in control of the water, and may have made the dedication to public use, using defendant's water-works as the means, and the defendant as the agent, for the distribution; or the water may have ceased to flow, or the public right may have been divested, and the water converted to private use. This is well illustrated by the subsequent proceedings in the case, the court finding that the stockholders of the defendant are the owners and entitled to the use of all the waters of the creek, except that portion which has been theretofore distributed to the plaintiff's premises; and, if there is any finding at all as to plain-

tiff's right, it is that he is the owner and entitled to the use of this excepted portion under a right by appropriation and user, which right has been recognized and acquiesced in by defendant.

The pleading must be construed most strongly against the pleader. If a fact necessary to his cause of action is not alleged, it must be taken as having no existence. The rule, sometimes applied, that defects in a pleading, consisting of facts appearing by implication only, will be considered as cured by the verdict or findings necessarily implying the existence of such facts, has no application here, because, as above stated, the finding is contrary to the inference or implication. Therefore it must be assumed, in ruling upon the demurrer, that some other person or persons did own and control the water, and that the defendant was only in the management and control of the means by which that water was conveyed to the plaintiff's premises, and was not in charge of the public use of the water. For these reasons the demurrer should have been sustained, and the preliminary injunction dissolved.

It may be added, in view of a possible amendment of the complaint in the lower court, that there is no direct allegation in the complaint that at the time the action was begun there was any water in Hot Springs creek which could be made the subject of public use, and there is no averment, except by inference, that there ever was any water flowing in that creek.

As there may be another trial in the lower court, it is proper to notice some other questions arising upon the record, and likely to affect the final decision in the case. It is difficult to determine on what theory the court below founded its conclusion of law that the plaintiff was entitled to the injunction. It must have been either that the findings showed the plaintiff to be the owner of a portion of the waters of the creek by appropriation and use as an appurtenance to his land, of which right he had not been divested, or that the water was devoted to public use, and that plaintiff, as a beneficiary of the use, was entitled to have the water supplied to him so long as he paid the rates. If the former theory was adopted, then the findings are entirely outside the issues, and the judgment can not stand. Schirmer *v.* Drexler, 134 Cal. 134. If it was the latter, then the conclusion is not justified by the findings. There seems to be a claim, though not definitely stated either in the findings or briefs, that at times when there was more water than was required for the defendant's stockholders the surplus was devoted to public use by the defendant or its predecessor, and that plaintiff received water from this surplus. If this were true, the decree should have limited the plaintiff's right to the use only of this surplus water. But the findings do not warrant such claim.

The court below seems to have been in some uncertainty as to the nature of a use of water which could be called a public use. Section 1, art. 14, of the Constitution, declares that "the use of all water appropriated for sale, rental, or distribution" is a public use.

So, also, does the act of March 12, 1885, Stat. 1885, p. 95, ch. 115. It has been held that the word "appropriation," as used in the Constitution, is not limited to water appropriated under the provisions of the Civil Code, but is general in its meaning, and includes all water, however acquired, which is devoted to public use. Merrill *v.* Southside I. Co., 112 Cal. 426. But it can not be held that the meaning of the constitutional provision should be so broadened as to cover the proposition that all water which is distributed among a number of persons is, from that fact alone, to be considered as devoted to a public use. Where a number of persons owning land are each entitled to take water from a common stream or source for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code, or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property, and not the subject of public use, although the persons so owning interests in the stream are very numerous, and their lands include a large neighborhood. The owners of such water rights may make a joint diversion and may carry the water from the point of diversion in a common conduit, made with common funds; and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several, and will remain private property. If the persons owning such rights see fit to form a corporation, and delegate to such corporation the work of making the diversion and distribution and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before. This principle was decided in substance in McFadden *v.* County of Los Angeles, 74 Cal. 571, and it was also recognized in McDermont *v.* Anaheim, etc., Co., 124 Cal. 114. In the case of a public use the beneficiaries do not possess rights to the water which are, in the ordinary sense, private property. A public use "must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates." McQuillen *v.* Hatton, 42 Ohio St. 202. "The use and benefit must be in common, not to particular individuals or estates." Lewis, Eminent Domain, sec. 161; Coster *v.* Tide Water Co., 18 N. J. Eq. 68; Pocantico Co. *v.* Bird, 130 N. Y. 259; Gilmer *v.* Lime Point, 18 Cal. 251; McFadden *v.* County, supra. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or

dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not.

With these principles in mind there should be no great difficulty in determining whether all or any of the water was devoted to a public use, of which plaintiff was a beneficiary, or was the subject of private ownership. The judgment specifies no quantity of water to which plaintiff is entitled. His right would, at all events, be confined to his actual needs for use on the premises. But it is very apparent from all the evidence that his right, if any he has, may be still further curtailed by a scarcity of water, and any decree in his favor should define his share in such an event with as much certainty as the facts will allow.

There are other questions arising upon the sufficiency of the evidence to justify certain of the findings, and from alleged errors of law, but, as they may not arise again, it will not be necessary to consider them.

The judgment and order refusing to dissolve the injunction are reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

We concur: Van Dyke, J.; Angellotti, J.; McFarland, J.; Lorigan, J.; Henshaw, J.

LEAVITT *v.* LASSEN IRRIGATION CO.

1909. SUPREME COURT OF CALIFORNIA

157 *Cal.* 82, 106 *Pac.* 404, 29 *L. R. A.* (*N. S.*) 213

HENSHAW, J.: Plaintiff's complaint contained two causes of action. In the first he asserted his ownership of the Leavitt Buggytown ranch, containing 1,000 acres; alleged that he was of right entitled to take, free of charge, sufficient water from defendant's canals and ditches to thoroughly and properly irrigate all of these lands. He alleged that defendant refused to allow him so to take the water in the irrigating season of 1905, and that by reason of this refusal his crops were seriously damaged. The second cause of action sets forth a like claim to the free taking and use of water from the defendant's ditches sufficient to thoroughly and properly irrigate another piece of land of 160 acres, in the irrigating season of 1905; the defendant refused to allow plaintiff so to take the water, with the result that his crops were damaged. In both causes of action he seeks compensation for this damage, and an adjudication of his rights to water for these lands. The cause was tried without a jury, judgment passed for plaintiff, and from that judgment and from the court's order denying defendant's motion for a new trial it appeals.

1. Plaintiff's asserted right to the free use of water for his Buggytown ranch rests upon the following facts: In 1889 and the years following plaintiff constructed the Susan river irrigation system, by which he appropriated, for the purposes of sale, rental, and distribution, the surplus waters of Susan river, in Lassen county. Plaintiff testifies that he appropriated these waters for the purposes of sale, rental and distribution, and also for private use upon his Buggytown ranch. The court finds that immediately after the construction of the system plaintiff appropriated and used from the waters of the system a sufficient quantity to irrigate this ranch. Subsequently plaintiff sold his water system, but, in selling, reserved to himself "the prior and preferred right to take from said system a sufficient quantity of water to properly irrigate during the irrigating season of each and every year all of the lands comprising said Leavitt Buggytown ranch." After further findings to the effect that defendant acquired title to the system with full notice and knowledge of plaintiff's prior and preferred right, the court gave its judgment that "plaintiff has a prior and preferred right to take from said system, free of charge, during the irrigating season of each and every year; water in sufficient quantities to thoroughly and properly irrigate all of the lands comprising the said Leavitt Buggytown ranch (describing it), and the defendant, its agents, attorneys and employes be and they are hereby perpetually enjoined from in any manner interfering with plaintiff's right to take from said system so much of the waters thereof as may be necessary to irrigate the said 1,000 acres of land during the irrigating season of each and every year." For respondent, the most favorable view which can be taken of the evidence is that he made an appropriation of waters for the public use of sale, rental and distribution under the Constitution of 1879; that by means of the same canal and ditches he made a private appropriation of waters for use upon his individual land; and that when he came to sell his irrigating system he withheld from the sale the waters so privately appropriated. It can not be said that there was anything illegal in these acts. But when the rights of plaintiff come to be measured by the trial court, it is noticeable that he is given far more than the facts and the law warrant. Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his ipse dixit, convert a public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the Constitution itself has declared shall forever remain a public use. Therefore the

only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator—not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured by and limited to this quantity. Senior *v.* Anderson, 115 Cal. 496; Smith *v.* Hawkins, 120 Cal. 86; Strong *v.* Baldwin, 137 Cal. 440. The findings and judgment, as above quoted, establish that the court adopted the erroneous view that respondent, by his so-called reservation, had been able to secure for himself an undetermined quantity of water, without regard to the amount which he had been beneficially using. The findings and judgment are silent upon the question as to this latter amount, and the judgment upon this cause of action must therefore be reversed. This discussion has been upon the assumption that Leavitt did in fact make a private appropriation of water for use upon his Buggytown ranch in connection with his appropriation of the waters of Susan river for public use. If, however, the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void.

2. Respondent's second cause of action is based upon breach of contract. One Purser came into the ownership of Leavitt's irrigation system. As Purser became the owner subject to whatever force and effect attached to Leavitt's reservation of water for his Buggytown ranch, it is to be remembered that all other waters were appropriated for the public use of sale, rental and distribution, and that Purser stood simply as the agent of the public in the execution of this use. Purser, while so the owner, made a contract with Grace Elledge, a daughter of plaintiff, who was at that time in possession of 160 acres of land. By this contract Purser agreed to supply Grace Elledge with sufficient water from the Susan river irrigation system for the annual irrigation of this land. Grace Elledge agreed to pay the sum of $1 per acre annually "for each and every acre of land which may have been previously cleared of brush or cultivated." It was further agreed that the water should be delivered by Purser at seasonable times and should be taken and used by Grace Elledge in conformity to the lawful rules and regulations which Purser might make. It was understood that Grace Elledge should have a priority of right to the use of water over and above all other consumers saving those who held contracts like her own. The contract contained many other provisions; but, as they touch matters foreign to this consideration, it is not necessary to set them forth. This contract between Purser and Grace Elledge was acknowledged upon

February 15, 1896, and upon the same day there was indorsed thereon, but not acknowledged, the following: "For a valuable consideration I hereby assign the within agreement and all my rights thereunder to B. H. Leavitt. [Signed] Edward T. Purser. Grace E. Elledge." Subsequently Grace Elledge made a deed of the 160 acres of land to her father, Leavitt, granting therewith "all ditches, water and water rights used thereunto or appurtenant thereto." Upon this state of facts the court found that Leavitt was entitled to take from defendant's system, free of charge, "a sufficient quantity of water during the irrigating season of each and every year to properly and thoroughly irrigate" this 160 acres, and that this right was a permanent right and prior and preferred over all other rights, saving the rights of those who had contracts with Purser of like effect.

Against this judgment appellant advances many propositions of gravity, not a few of which we consider valid. Thus, he argues that the judgment itself is void for uncertainty, in decreeing to respondent in general terms water sufficient to "thoroughly irrigate 160 acres of land," without specifying the quantum of water, the kind of irrigation, or in any way the amount which might actually be needed. Again, he argues that the contract itself provided that Purser, the owner of the system, would supply water under the rules and regulations which he might make, while the decree entitles Leavitt to enter and take the water. He further argues and shows that the purported assignment to Leavitt was not acknowledged, so that no constructive notice came to appellant of the purported assignment, and that if, as respondent contends, Grace Elledge's rights were such as passed by her deed to her father, it could only be so upon the theory that an easement—an interest in land—had been created, and if such was the case, and as Purser had made a subsequent assignment of his rights under this very contract to a third person and it had been duly recorded, Leavitt's unrecorded assignment became void. Civ. Code, sec. 1214; Cady *v.* Purser, 131 Cal. 552, 82 Am. St. 391. Again, appellant argues, and with much force, that the effect of Purser's assignment of the contract to Leavitt, and of Grace Elledge's assignment of the contract to Leavitt, could not in law be the creation of a free right to water against the appellant; that Purser's assignment carried the right to collect tolls at the rate of a dollar per acre for the water supplied, but carried also the duty of supplying the water; that Grace Elledge's right was to receive water upon the payment of a dollar per acre; that the conveyance into a single person of all of both parties' rights and duties under such a contract could result in nothing but a merger of these rights and duties and an extinguishment of the contract, since no man can contract with himself and no man can be compelled to furnish water to himself and pay himself therefor a dollar per acre for so doing. These, and many other objections, are advanced against this judgment, with much force and learning. But the paramount question renders unnecessary their consideration and determination.

That question may be thus stated: Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental and distribution under the Constitution of 1879. He was but the purveyor of this public use, the agent in the execution of this public trust. If, by any method however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this: That a corporation, which has appropriated water which the Constitution has declared shall forever be devoted to a public use, may contract with A, B and C to supply them in perpetuity with a given quantity of this water, and then, by assigning in turn to A, B and C its rights under these contracts, confer upon A, B and C a private right superior to and destructive of the public use. If this can be done with one, it may be done with many, and water which has thus been appropriated for public rental, distribution and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done.

The fundamental and all-important proposition then is this: That a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution and sale, can not confer upon a consumer any preferential right to the use of any part of its water. Even before the adoption of the Constitution of 1879, and its declaration therein contained (art. 14, sec. 1), it was said by this court, in Price *v.* Riverside L. and I. Co., 56 Cal. 431: "Every corporation deriving its being from the act above cited has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created." In McCrary *v.* Beaudry, 67 Cal. 120, is contained the first statement of this court in construction of the constitutional provision: "Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner." And in the late case of Hildreth *v.* Montecito Creek Water Co., 139 Cal. 22, it was said by Mr. Justice Shaw, speaking for the court in bank, in defining the public use declared by the Constitution: "In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use 'must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.' McQuillen *v.* Hatton, 42 Ohio St. 202. 'The use and benefit must be in common, not to particular individuals or estates.' Lewis on Eminent Domain, sec. 161; Coster *v.* Tide Water Co., 18 N. J. Eq.

68; Pocantico Co. *v.* Bird, 130 N. Y. 259; Gilmer *v.* Lime Point, 18 Cal. 251; McFadden *v.* County of Los Angeles, 74 Cal. 571. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." The principle receives universal recognition, says the Supreme Court of Indiana, in State ex rel. Wood *v.* Consumers' Gas Trust Co., 157 Ind. 345, 55 L. R. A. 245. "No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any." 45 Cent. Law J. p. 278; Haugen *v.* Albina L. and W. Co., 21 Ore. 411, 14 L. R. A. 424; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311; Com. *v.* Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499; Chicago & N. W. R. Co. *v.* People ex rel. Hampstead, 56 Ill. 365, 8 Am. Rep. 690; Nebraska Teleph. Co. *v.* State ex rel. Yeiser, 55 Nebr. 627, 634, 45 L. R. A. 113; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429, 63 Am. St. 841; State ex rel. Atwater *v.* Delaware, L. & W. R. Co., 48 N. J. L. 55, 57 Am. Rep. 543.

All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate and to abide by the reasonable rules and regulations of the company. It does not follow that a water company may not make specific contracts with individual consumers which are within the purview of the Constitution and within valid legislative enactments regulating the public use. This is precisely as decided by Fresno Canal Company *v.* Park, 129 Cal. 437. But, as decided in Crow *v.* San Joaquin Irr. Co., 130 Cal. 309, immediately following the Park case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply. The language of this court in Stanislaus Water Co. *v.* Bachman, 152 Cal. 716, 15 L. R. A. (N. S.) 359, must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor; its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to Bachman's land attached the water right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional

argument that the water was in fact devoted to public use, that if it could be thus attached to land as an appurtenance, the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it attempted to create the appurtenance or fix rates. This argument is not fully stated in the opinion. In answer to the argument, the court cited the case of Fresno, etc., Co. *v.* Park, supra, and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract disposing of water devoted to public use, of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made, and the contract controlled the rights of the parties. It was therefore immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water right was appurtenant to the land as private property, or whether the land was entitled to a part of the water as a sharer in the public use, where public rates had not been fixed and private contracts controlled. This is the essence of the decision, and it does not conflict with Hildreth *v.* Montecito, supra, or any other cases on the subject of public use.

The foregoing statement that a water company, or person in charge of water devoted to public use, can not confer a preferential right upon one consumer over another, is not to be understood as denying the right of such company or person in possession of a limited amount of water to devote that amount to the irrigation of a given area of land. We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its waters, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust.

Hunt *v.* Jones, 149 Cal. 297, is not in conflict with the principle enunciated. A land company had acquired water for use upon its lands. It was in its nature a private appropriation. In selling the lands it sold with them, as appurtenant to them, a proportionate share of water as a private water right. It was in effect the sale by a private landowner of land with water rights appurtenant thereto, and his subsequent attempt to withhold the water. It involved no question of the rights of consumers in waters appropriated to public use.

It is, of course, a truism of the law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the Constitution and, to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the state for public rental, distribution and sale, can not give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their quantum shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has fairly apportioned between its consumers. If it be conceived that section 552, Civ. Code, is designed to confer upon any particular consumer any special, permanent, and preferential right above what is here stated, that effort, being plainly violative of the Constitution, would be held void. The same declaration applies to the provision of the act entitled "An act to regulate and control the sale, rental and distribution of appropriated waters in this state other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12, 1889, and of the amendment to that act by the act approved March 2, 1897, Stat. 1897, p. 49, ch. 54.

In Fresno Canal Co. *v.* Park, supra, it was held that, in the absence of a rate fixed by the supervisors, a rate agreed upon between the parties could be enforced. In Crow *v.* San Joaquin, etc., Canal Co., supra, it was held that a consumer did not deprive himself of the right to take water under the rate established by law by reason of his refusal to pay under and in accordance with the terms of his contract. In this case there was no refusal upon the part of the appellant company to furnish water. Respondent was tendered the water—first, at the rate fixed by law, and, second, at the rate fixed by the Grace Elledge contract. But he refused to pay anything for the water, and insisted upon his right to take it and use it without charge. This right he did not have. The utmost for which he could contend was the right to the use of water (in consonance with the foregoing principles) upon tender of payment of the contract rate. The contract was continuous, its obligations concurrent. Respondent's conduct amounted to more than a default. It was an intentional breach and repudiation by which, whatever it may have been conceived they were, his rights under the contract came to an end. Page on Contracts, secs. 1447, 1461; South Boulder R. C. Ditch Co. *v.* Marfell, 15 Colo. 302; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: Shaw, J.; Angellotti, J.; Sloss, J.; Lorigan, J.; Melvin, J.

HUNT *v.* JONES ET AL.

1906. SUPREME COURT OF CALIFORNIA. DEPARTMENT 2

149 Cal. 297, 86 Pac. 686

LORIGAN, J.: This is an appeal from a judgment, and involves the validity of an order sustaining a general demurrer interposed to an amended complaint by the defendant Oroville Water Company. The complaint (it is quite lengthy, and we give such a synopsis of it as we deem pertinent on this appeal) alleged that in 1887 an association known as the "Thermalito Colony Company" was the owner of 2,000 or 3,000 acres of land near Oroville, Butte county, and was the owner at the same time of a large supply of water; that it had surveyed said land into lots and blocks for a colony site, and had laid mains and water pipes along the avenues of said tract, and was running water through them for the purpose of irrigating said lots and blocks, so as to enable the production thereon of citrus fruits; that thereafter, and prior to 1889, plaintiff entered into a written contract with said company to purchase, and did purchase, a block of land consisting of twenty acres; that as part of said contract and sale said company sold to plaintiff a sufficient amount of water from its said water supply to irrigate said twenty acres of land so that it would grow citrus fruits thereon, which water was to be delivered by said company upon said twenty acres in such quantities as plaintiff might need, plaintiff to pay said company not to exceed ten cents per inch, miner's measurement, for each twenty-four hours the said water was run and used by him; that the covenant selling said water and agreeing to furnish the same was made a covenant running with the land then owned by said company, and also with the water supply, mains, ditches and water pipes owned and used by it; that plaintiff paid to said company for said twenty acres of land and said water the sum of $2,000 cash; that the main and only inducement for the purchase of the said land was the sale of said water as aforesaid, and that the land without the water was not of the value of $5 an acre; that thereafter said company not having conveyed said land and water to plaintiff, and the legal title being in defendant A. F. Jones, at the request of the company, Jones conveyed to plaintiff said land and water, which conveyance in 1894 plaintiff caused to be recorded in Butte county. At the time of this purchase of the land and water the company had laid down mains and pipes for carrying

it to the tract purchased by him; that relying on the promises, covenants and agreements of said company to furnish said water at the price agreed, said plaintiff set out said twenty acres in olive and orange trees, and said company furnished plaintiff with water from said pipes and mains according to the terms of the agreement for many years thereafter; that in 1898 the defendant Oroville Water Company purchased from said Thermalito Colony Company its entire water supply, water ditches, water rights, pipe lines and mains, and its right to run water in said pipes and deliver and sell the same to persons who had purchased land from said colony company in said tract, and ever since said date has been selling and furnishing water to said persons by means of said water supply and mains aforesaid; that at the time of the purchase by said water company it knew that plaintiff had purchased said twenty acres of land from the Thermalito Colony Company, and a sufficient amount of water to irrigate the same, according to the terms herein referred to, and had for many years been in the actual use and possession of said land growing citrus fruits thereon, and irrigating the same from said water supply purchased by him from the colony company; that the said Oroville Water Company after its purchase and up to 1902 furnished water to irrigate said piece of land according to said terms; that in said year it notified plaintiff that he would have to pay $100 a year for water rights to irrigate said lot, and if half thereof was not paid by the 1st of April of that year the water would be shut off from use by him; that if said water is shut off as threatened by defendant, and the said orange and olive trees not irrigated each month they will die; that said land without said water to irrigate said trees would be worthless; that there is no means or way by which said land can be irrigated except by said water supply, water pipes and mains of defendant, and that to shut off said water would cause him irreparable damage and injury; that the plaintiff had already expended in the care and growing of said trees more than $4,000. The prayer of the complaint was for a perpetual injunction restraining defendant corporation from shutting off the waters as threatened, and for a decree determining his right to said water as contracted for and conveyed by the Thermalito Colony Company to him. * * *

It is further insisted that the contract with reference to the water supply for the benefit of plaintiff's land made by the association was not a covenant running with the land, but, at most, a personal covenant, which was not binding upon the water company defendant, as assignee of the Thermalito Colony Association. We do not discuss the point as to whether the covenant here in question was one running with the land so as to bind the assignee of the water company as grantee of plaintiff's covenantor, the Thermalito Colony Company, association, because we think that, treated simply as a personal covenant or agreement under the allegations of the complaint, a court of equity would be warranted in enforcing it against the defendant. There can be no doubt of the proposition that personal covenants or

agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another. The general rule is stated in Pomeroy's Equity Jurisprudence (2d ed.) secs. 688 and 689: "The third and, in its practical effects, by far the most important rule is that a party taking with notice of an equity takes subject to that equity. The full meaning of this most just rule is that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of an existing estate, interest, claim or right, or to some subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. * * * A purchaser with notice of a prior contract to sell or lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution. * * * On the same principle, if the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements, or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which 'in law runs with the land.'" In Whitney *v.* Union Railway Company, 11 Gray (Mass.) 359, 71 Am. Dec. 715, it is said: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he can not equitably refuse to perform."

The authorities undoubtedly sustain the proposition that where a proper case is presented, equity will enforce a personal covenant of agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land. And we think there can be no question but that the facts alleged in the complaint show a proper case for the application of the rule in the case at bar. There is every equitable reason for its application, and none to be suggested why it should not be applied. The Oroville Water Company acquired its title to the water works and right to distribute water throughout the colony tract, from the company from which plaintiff had purchased his land and right to the water, with full knowledge of the interest that plaintiff had acquired under his deed. It undoubtedly was advised of the situation and surroundings, and knew that the land on which this water was being distributed was

only valuable by reason of the fact that water to irrigate it could be provided. The sole inducement to the purchaser of the tract acquired by plaintiff was that he could acquire a water right in connection with it, that without it the land was practically worthless, and he did acquire this right practically for a cash consideration of $1,900, the right to have water distributed on his land at certain fixed rates, and on the faith of such purchase and contract set out his orchard and expended thousands of dollars in caring for it; that without the use of this water his orchard would perish and his investment become a total loss. All these facts must, in the nature of things, have been known to the defendant corporation when it purchased from the association, and it particularly knew, so it is alleged, that plaintiff had purchased his land and accompanying water right from its grantor. Taking all these facts into consideration, it would be clearly inequitable after plaintiff had paid a full consideration of $1,900 for the water right, which he was enjoying at the time that the defendant made its purchase from the association, to say that the association could transfer all its interest in the water supply to the defendant, and that though the latter knew of plaintiff's purchase and right thereunder, it, nevertheless, acquired the property from the association free from any claim or interest in favor of plaintiff as to the particular water right which he had previously purchased, and likewise free from any obligation the association had incurred or assumed relative to it in his favor. If this were true, it would follow that defendant would be under no obligation to furnish plaintiff with any water for irrigation at all, with the inevitable result, if it did not, that his orchard would perish and his property become worthless. The facts recited in the complaint, we think, set forth a proper case in which equity should interfere to prevent this result, and that the order sustaining the demurrer was erroneous.

The judgment is reversed, with directions to the lower court to overrule the demurrer, and allow the defendant to answer.[42]

We concur: Beatty, C. J.; Henshaw, J.

[42] See Byington *v.* Sacramento Valley, &c. Co. (Cal.), 148 Pac. 791; Escondido Mutual Water Co. *v.* Escondido (Cal.), 147 Pac. 1172; Thayer *v.* California Development Co., 164 Cal. 117, 128 Pac. 21; Del Mar Water, Light and Power Co. *v.* Eshleman, 167 Cal. 666, 140 Pac. 591; Stanislaus Water Co. *v.* Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359; Franscioni *v.* Soledad Land & Water Co. (Cal.), 149 Pac. 161; Wheeler *v.* Northern Colorado Irrigating Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. 603.

COPELAND ET AL. *v.* FAIRVIEW LAND AND WATER CO. ET AL.

1913. SUPREME COURT OF CALIFORNIA

165 *Cal.* 148, 131 *Pac.* 119

SHAW, J.: The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The object of the plaintiff's action was to obtain a decree declaring that they were each entitled to receive from the Fairview Land and Water Company sufficient water upon their respective tracts of land for irrigation and domestic use thereon, upon payment of charges sufficient to defray the expenses of keeping up the water system and distributing the water, and to enjoin the Fairview Company from demanding or collecting charges for the delivery of such water in excess of the sum reasonably necessary for the purposes stated, not exceeding ten cents per inch per day of twenty-four hours. As to the Lake Hemet Water Company, they ask a decree declaring that they were entitled to share in the water of that company whenever the water of the Fairview company was insufficient to supply and irrigate their said lands.

The court adjudged that the plaintiffs McCunn, Bradshaw, Hart, Elise Beck, Catherine Beck and Emily Compton, as to certain lands specifically described, had no right to demand or receive water from either defendant. With regard to the other lands described in the complaint, the judgment was that the plaintiffs are each entitled to the continuous use of water for irrigation and domestic purposes upon their respective tracts of land, to be delivered to them by the Fairview Land and Water Company, upon the payment of such legal rates and tolls as shall be charged for furnishing the said water, but that none of the plaintiffs had any right or interest in water belonging to the Lake Hemet Water Company. The right of the plaintiffs, except as above stated, to receive water from the water supply in control of the Fairview company, on payment of lawfully fixed tolls, was conceded by that company in its answer. Thus it will be observed that, except as to the lands first mentioned, the only dispute between the plaintiffs and the defendant the Fairview Land and Water Company is whether the charges which the company may impose are limited to the amount necessary to cover the cost of keeping up the water-works and distributing the water, not to exceed ten cents for each inch per day, or whether the company may charge a greater sum, including reasonable annual interest upon its investment. And the main question on this branch of the case is whether or not the Fairview company is the owner of the water itself and may consequently include the value of the water supply as part of the investment upon which it is entitled to a reasonable return as part of its charges for delivering water to the plaintiffs.

1. We think the claim of right to receive water from the supply belonging to the Lake Hemet Water Company is not well founded.

We can not agree with the argument on behalf of that company that, as its water supply consists of water stored in a reservoir, such stored water is personal property which can not be appurtenant to land, in support of which Heyneman *v.* Blake, 19 Cal. 594, is cited. There is a statement in the opinion in that case that water, when collected in reservoirs and pipes and thus separated from its original source, is personal property. But this declaration can not be accepted as sound. The question involved in that case was the question whether or not a corporation which stores water, conducts it through the earth in pipes, and sells and delivers it by that means to the inhabitants of a city on their premises is engaged in trade and commerce. Unquestionably it is, but not, as is there erroneously said, because the water becomes personalty when thus stored, but, as is further said, because it is then sold for a price to the inhabitants. Upon delivery for household use, it undoubtedly becomes personal property, being then completely severed from the realty. The question of the character of water as property was fully considered in Stanislaus, etc., Co. *v.* Bachman, 152 Cal. 725, 15 L. R. A. (N. S.) 359. Heyneman *v.* Blake was distinguished, and the remark therein, above referred to, was declared not to be the law. Water, in its natural state, is part of the land. Like any other part thereof, it may become personal property by being severed from the realty, but not until then. When it is sold for domestic use and delivered by means of pipes to the premises in the usual manner, the pipes themselves are fixtures and part of the realty, and this severance takes place when the water is taken from the pipes by the consumer. In the case of water for irrigation, delivered in ditches or pipes, the severance does not take place at all. The water, by that use of it, permeates the soil and remains a part of the realty. The water of the Hemet company, stored in its reservoir, is therefore real property, the right to the use of which may become appurtenant to land.

There are other reasons, however, advanced by that company, which fully support its position. Plaintiff's claim is based wholly on a contract dated February 12, 1887, between the Fairview Land and Water Company and the Lake Hemet Water Company. The theory of the plaintiffs is that this contract vested in the Fairview company a right or interest in the waters belonging to the Hemet company, and that by mesne conveyances, which, for the present, it is not necessary to state in detail, a proportional share of this right in the Hemet water became vested in the plaintiffs. We think the said contract did not vest in the Fairview company any interest whatever in the water belonging to the Hemet company, and consequently that, whatever may have been the effect of the mesne conveyances above mentioned as to other waters, the plaintiffs obtained no interest in the Hemet water which can now be enforced. At the time that agree-

ment was made, the Fairview company and the Hemet company each had or claimed interests in the waters of the San Jacinto river, and there was some conflict as to their respective rights. The main purpose and effect of the agreement was to segregate and define the parts of the stream which should thereafter be deemed to belong to each company respectively, so that neither should thereafter have any right or claim in the part therein set apart to the other. The Hemet company therein quitclaimed and released to the Fairview company all right, title, or interest in the waters of two tributaries of the river known as Strawberry creek and the North fork and all of the waters of the South fork below a certain diversion dam to be constructed therein a short distance above the junction of the South fork and Strawberry creek. The Fairview company, in turn, quitclaimed to the Hemet company all right, title, or interest in the waters of the South fork above the said diversion dam. The clause under which the plaintiffs claim was as follows—the Hemet company being the first party and the Fairview company the second party: "And said party of the first part hereby agrees to and with the said party of the second part that, if at any time the water hereinbefore mentioned of said last-named party shall be insufficient to supply and irrigate its lands, the said party of the first part will furnish water to said party of the second part upon the same terms and price it furnishes water to other persons by the day or by the run, and will deliver such water into the pipes of said parties of the second part on their said lands at such points on the line of its pipe or pipes to which said parties of the second part may lay their pipes." This clause does not operate to transfer to the Fairview company any property right or interest in the supply of the Hemet company. At most, it is a mere executory agreement for sales of water, to be effective at the option of the Fairview company. As an agreement to sell an interest in property, it lacks the essential element of certainty as to the property which is to be delivered. It does not state the quantity of water to be furnished, nor give any means of determining that quantity. The precise act to be done in its performance is not clearly ascertainable. It is therefore incapable of enforcement against any specific property. Berry *v.* Woodburn, 107 Cal. 508; Magee *v.* McManus, 70 Cal. 556; Stanton *v.* Singleton, 126 Cal. 664, 47 L. R. A. 334; Meyer *v.* Quiggle, 140 Cal. 498; Civ. Code, sec. 3390, subd. 6; 2 Devlin on Deeds, sec. 1010.

Furthermore, all right of action to enforce the contract in equity is clearly barred by laches. The water quitclaimed to the Fairview company was always insufficient to irrigate the Fairview tract, yet for the entire period from the making of the contract in 1887 until a few months before this action was begun, no water was ever demanded under the contract either by the Fairview company or its successors in interest or by any of the plaintiffs, and the validity of the contract as a conveyance or agreement to convey an interest in

the waters of the Hemet company was never at any time recognized by that company. The action was begun on October 29, 1908. The statutory period of limitation had run over and over again. For these reasons we conclude that the plaintiffs have established no right or specific interest in the water belonging to the Lake Hemet Water Company.

There is some discussion of the proposition that the Hemet company is a public service corporation and that the plaintiffs, as beneficiaries of the public use, are entitled to take water from its system. There is no direct evidence that the Hemet company is distributing its water to the public, or for general use, or that its water is, or has been dedicated to the use of the public or any part thereof. But, if it is conceded that its water is devoted to the public use, there is no evidence to show that the lands of the plaintiffs are within the area to which such water has been dedicated, or that they are entitled to water from that system, or that the company has any surplus to apply to lands not within the original dedication. See Hildreth *v.* Montecito, etc., Co., 139 Cal. 29; Thayer *v.* California Dev. Co., 164 Cal. 117. It follows, from these considerations, that the judgment and order appealed from, so far as the Lake Hemet Water Company is concerned, are correct and should be affirmed.

2. For a proper understanding of the differences between the plaintiffs and the Fairview Land and Water Company, a more elaborate statement of facts is necessary. There is no substantial conflict in the evidence as to the facts about to be stated. In the early part of the year 1887, that company, which we will hereafter designate the Fairview company, was the owner of a tract of land containing 2,897 acres of land known as the Fairview tract, abutting upon the San Jacinto river and being a part of a larger tract comprising a Mexican grant known as the Rancho San Jacinto Viejo. This tract being riparian to the stream, the company had the right to use the water upon the land and to that extent it owned an interest in the waters of the river. Its right was limited to the portions of the stream quitclaimed to it by the contract hereinbefore mentioned between it and the Hemet company, but it was obviously a riparian right. The land and the water together were very valuable; separately, the land, at least, was comparatively worthless. The Fairview company adopted the plan of selling the land in parcels together with a share of the water, charging a lump sum for each parcel of land combined with a proportionate share of the water. For this purpose it had the land surveyed and subdivided partly into town lots and partly into parcels of twenty acres each. Thereupon it announced that it had a water supply for the use of such land; that it would pipe such water to each parcel thereof so surveyed; and that it would sell the land with the right to receive a proportionate share of the water for use thereon at the prices fixed. In order to carry out this plan respecting the water, the Fairview company, through its board of directors,

organized a subsidiary company, called the Florida Water Company, with a capital stock of 20,000 shares of the nominal par value of $5 each. To the Florida company it conveyed all of its rights in the water of the San Jacinto river and its tributaries aforesaid, receiving in exchange therefor all the said stock of the Florida Water Company, except fifty shares which were retained to be used to qualify persons to act as directors and which were accordingly issued to persons designated by the Fairview company, who thereupon became directors of the Florida company. The certificates issued by the Florida company, as evidence of its shares of stock, each declared, in substance, that for each share of such stock the holder thereof was entitled to one twenty-thousandth part of the water belonging to the Florida company. Thus, in effect, the water right attached to this land became the property of such stockholders. The purpose of the Fairview company in organizing this auxiliary company was to facilitate the sale of a proportional part of the water right with each sale of the parcel of land. Accordingly each agreement of sale provided that five shares of said stock would be sold with each acre of land and one share with each town lot, and that the Fairview company would pipe the water to each parcel. As the parcels were conveyed to the respective purchasers, the stock was transferred in accordance with the agreement. The agreement also provided that the stockholders of the Florida company must thereafter bear the expense of keeping up the water system. The Fairview company still remained the holder of a majority of the stock. Each purchaser of land in this manner bought and paid for his due proportion of the water right. The money for the construction of dams and conduits necessary for the diversion and distribution of the water to the several parcels was furnished by the Fairview company, partly before and partly after it deeded its water rights to the Florida company. That deed was dated May 20, 1887, but it was not acknowledged until August 3, 1887.

Until the year 1892, the directors of the Florida company distributed the water to the parcels of land which had thus been sold by the Fairview company. These directors were elected by the Fairview company through its ownership of a majority of the stock of the Florida company, and they acted at all times in harmony with the wishes of the directors and managers of the Fairview company. Up to this time no specific charge appears to have been made for the distribution of water, but there were occasional assessments upon the stock of the Florida company to pay expenses, and they were paid by the respective stockholders without objection. The expense of keeping up the repairs of the water system was, for the most part, paid by the Fairview company, whether out of these assessments or not does not appear. In 1892 there was an attempt made under the state law to organize an irrigation district in that vicinity. In November of that year the Fairview company made a formal transfer

of all the stock which it then owned in the Florida company, being some 14,800 shares, to the irrigation district, taking in exchange therefor bonds purporting to have been issued by said district. At that time it was supposed that the irrigation district had a legal existence. Thereafter the directors of the Florida company were elected by persons claiming to act as directors of the irrigation district, so called; they being in control of a majority of the shares of the stock of the Florida company, and these Florida company directors continued to distribute the waters of the system to the respective owners in proportion to their interest. This method continued until July, 1899. During this period it was found necessary to make charges against the water users for the expense of repairs and service, and such charges were made and paid without objection by the plaintiffs. Some time after the supposed organization of the district, its legality was attacked by an action for that purpose, and on July 11, 1899, the superior court of Riverside county adjudged that it had not been legally organized, and never had a legal existence. Its bonds were therefore utterly void. At the same time the Florida company practically ceased to act as a corporation and abandoned all right or claim to the water-works known as the Florida system and to the water rights previously conveyed to it by the Fairview company. The Fairview company thereupon took charge of the water system and thenceforward managed and controlled the same, diverting and distributing the waters to the parcels of land which it had previously sold with water stock. Upon taking charge thereof, it gave notice to each of such landowners that it had taken control of the system and would distribute the water to them in such quantities as they might desire, upon payment of charges to be imposed. It continued to do so from that time until shortly before this action was begun, without any objection or dispute arising between it and the plaintiffs. Concerning the amount of the charges to be imposed, there is no evidence that it gave notice to the plaintiffs that it claimed the right to charge for any other purposes than to cover the cost of repairs and a reasonable charge for the expense of distribution. Nor did it at any time deny that the several plaintiffs had the right, under the sales of land with the Florida Water Company stock, by which their lands were originally acquired, to participate in the use of the water belonging to the system. It did, however, fix its charges according to the quantity of water delivered, and made no attempt to apportion the water between the several landowners in proportion to their respective shares of Florida stock. But it never announced or notified the landowners that this was done in repudiation or denial of their title to a share of the water.

Upon these evidentiary facts the court declared in its findings that the Fairview company did not sell the lands in question together with water for irrigation and domestic use thereon; that the Florida company was not formed to hold and control the water for the con-

venience of the Fairview company; that there was no intention that the Florida company, in taking title to the water, should act as agent of the Fairview company to distribute said water to the purchasers of land from said Fairview company; that the Fairview company did not control the appointment of officers and agents of the Florida company or the election of its directors or direct its policy and business up to the year 1892; that the certificates of stock in the Florida company declared that each owner of a share was entitled to one twenty-thousandth part of the water owned by that company, but that, in fact, such holder did not thereby become entitled to said share of said water; and that from the time the Fairview company took possession of the water supply and water system on July 11, 1899, until the beginning of this action, its possession was adverse, not only to the Florida company, but also adverse to all claim of the plaintiffs or either of them to a right or share in said water supply, and that its said possession was under a claim by the Fairview company that it was the absolute owner of the water and had the right to impose charges for the sale or delivery thereof to the plaintiffs in excess of the amount required for the expenses of keeping up the system and a fair remuneration for the service, and, in effect, that the Fairview company was the absolute owner of the water and water supply, so far as the charges therefor were concerned. We think that these findings are contrary to the legal effect of the facts we have stated.

The water right in question was a riparian right arising from the fact that the lands abutted upon the river. It originally extended and attached to every part of the Fairview tract. The device of organizing the Florida Water Company, transferring to it the water right, receiving immediately from it certificates of stock declaring the holder of each share entitled to a proportional part of the water right, and thereupon selling the land in parcels together with a proportional number of the shares of stock, was a scheme for the apportionment of the water right to the several parcels of land so that each could thereafter be conveniently sold with its proper share of the water right. In effect it preserved the riparian right to the several parcels of land, regardless of their proximity to the stream, and vested in the owner of each parcel, as soon as it was sold to him, a proportional part of the riparian right originally held by the Fairview company in the waters of the stream. That such riparian right can be thus preserved in parcels which do not border upon the stream when, by the conveyance, they are severed from the original riparian tract is fully settled by the decisions in this state. Strong *v.* Baldwin, 154 Cal. 157, 129 Am. St. 149; Rose *v.* Mesmer, 142 Cal. 328; Anaheim, etc., Co. *v.* Fuller, 150 Cal. 331, 11 L. R. A. (N. S.) 1062; Verdugo, etc., Co. *v.* Verdugo, 152 Cal. 663; Hudson *v.* Dailey, 156 Cal. 624. How far such an apportionment or transfer is good against owners of other riparian lands upon the same stream, not part of the tract from which

such parcels are conveyed, we need not consider, since none of such other owners are parties to or concerned in this suit.

The certificates of stock declared that the holder thereof was "entitled" to a certain part of the water "belonging to" the Florida Water Company. The clear intent of this language and its legal effect was to transfer to the holder the title to that part of the water, the same title which the Florida company held at the time. The Florida company paid no consideration for the water, except by the issuance of this stock to its vendor. Its holding of the title during the infinitesimal point of time between its receipt of the conveyance of the water and the delivery of these certificates in exchange was a holding as a naked trustee for the benefit of its vendor, the Fairview company. That holding did not change the nature of the right nor divest the beneficial interest therein from the Fairview company, which still remained the owner of the land. When thereafter the Fairview company sold parcels of the tract to the plaintiffs and others, with the accompanying certificates of stock, the right to a share of the water passed to the purchaser and it remained, as before, a riparian right growing out of the situation of the Fairview tract as land abutting the stream. When such parcels were sold in this manner, with the certificates of stock carrying the water right, the Fairview company immediately became a tenant in common of the water right with the purchaser; each being entitled to his proportional share therein. As the Fairview company had actual control of the operations of the Florida company, by reason of the fact that it held a majority of the stock and did in fact select its directors, and as by that means it was in practical control of the water-works and the distribution of the water for the benefit of all the owners thereof, it stood in the relation of trustee for the owners of the several parcels of land so conveyed. During the time the persons in control of the irrigation district selected the directors of the Florida company, they occupied a similar trust relation to the several landowners.

It is proper to consider in this connection the effect of the purported transfer of the stock to the irrigation district. The authorities are apparently unanimous to the effect that a contract purporting to transfer property to a fictitious person, or to one who is dead at the time, or to a corporation having no legal existence, passes no title at all, but that the title to the property attempted to be transferred remains in the transferror. Muskingum Co. *v.* Ward, 13 Ohio, 127, 42 Am. Dec. 191; Hunter *v.* Watson, 12 Cal. 376, 73 Am. Dec. 543; Phelan *v.* San Francisco, 6 Cal. 541; Jackson *v.* Cory, 8 Johns. (N. Y.) 388; Douthitt *v.* Stinson, 63 Mo. 278; Harriman *v.* Southam, 16 Ind. 190. There are cases holding that if the corporation has a legal existence, but is merely incapable of holding the particular property, the transfer is good as to all persons except the state which created the corporation. But this exception has no relation to this case, for here the irrigation district never had a legal existence.

The result is that the transfer to the irrigation district was wholly void, and the legal title to the stock, notwithstanding that transfer, remained in the Fairview company, and it is now the owner thereof, with the corresponding shares of the water right which they carry. When, therefore, in July, 1899, the Fairview company took possession of the water-works of the Florida water system, it still remained a tenant in common of the water right with the other landowners in the Fairview tract, and it still stood in the relation of a trustee to them with regard to the control of the water-works and the distribution of the common supply of water.

It may be conceded that the act of the Fairview company in taking possession of the water-works in 1899 and thereafter holding the same and continuing the operation thereof was adverse to the right and title of the Florida company thereto, and that, after such possession had continued for five years without interruption, whatever right, title, or interest the Florida company had to the water-works or to the water supply thereupon passed to and became vested in the Fairview company. This fact, however, does not, itself, divest the title and right of the plaintiffs. The Florida company had the title to the water-works and pipes, whether as trustees or otherwise, it is not important to determine. But it did not hold the title to the water right or to the water. That title, as we have seen, had passed to the holders of the certificates of stock, and the plaintiffs and the Fairview company were tenants in common thereof. In order to make the possession of the Fairview company adverse to the plaintiffs and to their right and title to the water thus acquired by them, it was necessary for the Fairview company, occupying, as it did, the position of trustee towards plaintiffs, and tenant in common of the water supply with them, to distinctly inform them that it repudiated their claim and right to a share of the water, under their water stock, and that it claimed the ownership of all the water adversely to their title. If it claimed the right to impose charges to cover more than the cost of up-keep and a fair charge for the service of administering the system, it was necessary, under these circumstances, that it should make such claim clearly known to the plaintiffs and give them notice that its charges were for other purposes; otherwise its conduct in taking possession of the works and distributing the water for all concerned would not be adverse to the title of the plaintiffs and their right to receive a proportion thereof.

The mere fact that charges were imposed did not make its possession adverse. Similar charges had been imposed before and were to be expected. The original understanding was, and the original plan and the said agreements of sale of the parcels plainly imply it, that charges would be imposed from time to time as they became necessary to repair the works and pay the expense of distribution. During the time the irrigation district officers controlled the system, such

charges were made; but it does not appear that plaintiffs were informed or believed that by paying such charges they were yielding the ownership of the water which they had bought and paid for. The imposition of charges by the Fairview company, when it began distributing the water, did not give the plaintiffs notice that their right or title to their proportional share of water was disputed or invaded. They would reasonably suppose that the charges were imposed because of the necessity of raising money to defray the expense of repairs and the cost of the service. The evidence indicates that this was the sole purpose of imposing such charges as were made. The evidence also shows that the information given to the plaintiffs was that the charges were made because of the necessity of raising money for that purpose. There is no evidence that any other purpose was stated to any of the plaintiffs. We can not perceive that the fact that the water was delivered as called for, and that the charges were fixed by the quantity and without regard to the proportional share of each person, is of any weight as proof of an adverse claim by the Fairview company. There was no declaration or notice that such method was followed in pursuance of any adverse claim against the right of the plaintiffs. The natural inference would be that it was done in that manner because it was the fairest method of apportioning the common expense. The plaintiffs were given no information that it was done for any other reason. It was not, in itself, incompatible or inconsistent with the ownership of a share of the water supply by the respective landowners. We think, therefore, that the finding of adverse possession, so far as it is intended to declare that the plaintiffs lost their right to their proportional share of the water because of such adverse possession, is contrary to the evidence.

Since it does not appear that the charges imposed by the Fairview company exceeded the amount necessary to pay the cost of the service and expense of up-keep, it might be plausibly claimed that the judgment is not injurious to the plaintiffs. But the difficulty with this suggestion is that the findings declare that the entire water supply now belongs to the Fairview company, and the judgment goes upon the theory that it may fix its charges as absolute owner thereof, and that the plaintiffs have no right whatever therein, except the right to buy water at such rates as may be legally fixed or imposed. If this be true, it may fix the charges at a rate which will give it a revenue upon the actual value of the water supply itself, a proportional part of which, as we have seen, belongs to the plaintiffs and not to the said company. Thus it would be able to make the plaintiffs pay again for the water right which they had previously bought and paid for in connection with the purchase of their lands. It appears that the Fairview company, since it took charge, has expended a considerable sum of money in renewing and repairing the pipes and conduits of the system. No doubt it has a just right, as a part of its charge for the delivery of water, to include a sum sufficient to cover

plaintiffs' proportionate shares of the interest on this investment, and perhaps to enforce contribution of the principal. But it would have no right to base its charge upon the theory that it is the owner of the water delivered to plaintiffs, and that it is consequently entitled to a reasonable return upon the value of that water considered as an investment. If it does not intend to charge rates on this basis, the suit should be capable of a quick settlement, by a judgment containing a provision that it shall not do so.

For somewhat similar reasons we are of the opinion that the decision that the lands of McCunn and others, above mentioned, had no right to the water is erroneous. This conclusion seems to be based on one or the other of two theories: First, that their right to the use of the water is that of an appropriator under the provisions of the Civil Code, and that under section 1411 the right ceased when they ceased to make a beneficial use of the water; second, that their holding is, as of a title by prescription, in the nature of a servitude or easement acquired by enjoyment, which, under section 811 of the Civil Code, is extinguished by a disuse thereof for five years. There is evidence to the effect that these lands, or some of them, were not irrigated or served with the water for periods of at least five years. The fact that a new trial must be ordered makes it proper to consider these questions.

Assuming that the right is of a nature which would place it in one or the other of these classes, the conclusion that the right has ceased or has become extinguished, under the circumstances here existing, by no means follows. It might be so if a third person were claiming the water in opposition to all the parties to this action. But this is not such a case. Here the right was originally gained by the Fairview Company. If it was by diversion or appropriation, that company made it for use on these particular lands, and the diversion or appropriation has ever since that time been made by that company or its intermediaries, for the benefit of all the parties. The plaintiffs all derived their titles from and are holding under that company. Where one thus diverting the water and thereby acquiring a water right, whether by prescription or statutory appropriation, sells an interest in it to another and thereafter continues to divert the water himself for the vendee, the fact that the vendee does not demand or use the water he has bought may, if it is not otherwise beneficially used by some one receiving it from the appropriator, enable some third person to take such unused water and defeat the right of the first appropriator, upon the theory that such part has not been by him applied to a beneficial use. But we do not understand the law to be that such failure to receive or use the water by the vendee will forfeit his right thereto to the vendor, who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at

the time, no need will not forfeit the right to the vendor in such a case.

With respect to the theory that it is an easement or servitude originally acquired by enjoyment, it may be said further that, so far as the Fairview Company is concerned, it having acquired the right and thereupon transferred it by contract to the plaintiffs, it is not, as between them and the company, a right acquired by prescription, but it is a right which they have acquired from the company by conveyance, and the doctrine that an easement acquired by use is lost by mere disuse does not apply to a right gained in that manner. Smith *v.* Worn, 93 Cal. 212; Currier *v.* Howes, 103 Cal. 437; Walker *v.* Lillington, 137 Cal. 403.

But there is no evidence of such appropriation or right by prescription. The right, as we have stated, is a riparian right, and its nature has not been changed. The purpose of the original plan was to preserve to each parcel of land its proportional right to the water. It does not appear that there was any intention to sever or destroy the riparian right or to convert it into a right of a different character. The fact that the transfer was made through the agency and by means of the stock of the Florida Water Company does not substantially change the nature of the transaction or the nature of the right transferred. The transfer of the water right to that company was simultaneous with the retransfer thereof to the Fairview Company by virtue of the issuance to it of the entire capital stock. It was form without substance. It may be conceded that the result of this arrangement would be that by transferring his stock alone, without selling the land, the owner of a parcel would enable the vendee of the stock to have the water delivered to other land, and thus the water and the land would be effectually separated. But none of these plaintiffs have done this, and the right of each of them has preserved its riparian character. Such a right is not lost by mere disuse. The evidence does not show that the Fairview Company in any way manifested its intention to take and hold adversely to them the water to which these lands were entitled. Until it did manifest such intention to them, its title against them by prescription would not begin to run. The case, it appears, was not tried upon the theory that this was necessary.

The judgment and order are affirmed as to the Lake Hemet Water Company. As to the Fairview Land and Water Company, the judgment and order are reversed, and the cause is remanded for a new trial of the issues so far as they affect the rights of plaintiffs against that company and in accordance with the views herein expressed.[43]

We concur: Henshaw, J; Melvin, J.; Angellotti, J.; Sloss, J.

[43] Irrigation Districts: On irrigation districts and the scope and validity of statutes under which they are formed, see Wiel, Water Rights in the Western States (3d ed.), §§ 1356-1371.

SLOSSER *v.* SALT RIVER VALLEY CANAL CO.

1901. SUPREME COURT OF ARIZONA

7 Ariz. 376, 65 *Pac.* 332

SLOAN, J.: * * * The plaintiff, Slosser, is the owner of land described in his complaint, and this land is situated near the westerly end of the defendant's canal. Plaintiff purchased this land from one King Woolsey during the year 1877. At that time about ninety acres of this land had been cultivated. Plaintiff's grantors began the cultivation of this land in the year 1871, and water for this purpose was obtained first from the canal known as the "Chivari ditch," the head of which was below that of the Salt River Valley Company's canal. In January, 1874, the head of the dam of the Chivari ditch was destroyed by a flood, and seems never to have been rebuilt. The owners of stock in the Chivari ditch, including plaintiff's grantors, after the destruction of said ditch, obtained water rights in what was known as the "Monterey ditch." Plaintiff's land was irrigated from the Monterey until 1877, after which date, until the year 1880, plaintiff obtained water from what was known as the "Farmers' ditch." As all of these ditches headed at point on the Salt river, below the head of the Salt River Valley canal and other canals, it became difficult to keep the Farmers' canal supplied with water. During the year 1880 plaintiff obtained water from the Salt River Valley canal, by the payment of the yearly charge therefor made by the company; and plaintiff has continued ever since, with the exception of one or two seasons, to irrigate his land from the latter canal until denied this right by the defendant company. At one time it appears that plaintiff controlled a one-half share of stock in the Salt River Valley Canal Company, and by means of this obtained water from the company. After the adoption of the resolution by the defendant company limiting its sales of water to shareholders and lessees of the same, plaintiff complied therewith, and obtained orders from various shareholders, and obtained his water by means thereof. In November, 1895, plaintiff applied for water for the ensuing irrigating season at the company's office, but was denied the right, upon the ground that, not being the owner of a share of stock, he had not obtained an order from any shareholder therefor. He thereupon brought suit in the district court of Maricopa county, praying for a mandatory injunction requiring the defendant company to deliver to him the water which he had applied for upon the same terms and conditions required of shareholders and their lessees. The relief prayed for by plaintiff was granted by the trial court. In 1899 plaintiff again applied for water, and tendered the amount charged by the company for such service during the irrigating season of that year, and was again refused, whereupon

plaintiff brought this suit. The case was heard by the court, and judgment rendered for the defendant, denying the injunction prayed for and dismissing the complaint. From the ruling of the trial court denying plaintiff's motion for a new trial, this appeal is brought. The assignments of errors made by the appellant in his brief are based upon alleged errors in the findings of the trial court, and in the conclusions of law drawn therefrom, and upon the judgment rendered in accordance therewith.

The theory under which plaintiff claims the relief sought is that he is an appropriator of water, and as such is entitled to the service of the defendant company in the delivery of the water called for by his appropriation, upon the payment of the fixed charges of the company for such service, and that the defendant company, not being itself the owner of the water diverted by it, and being but a public agency for the carriage of water and delivery of the same to appropriators owning or possessing lands under it in the order of the priority of their appropriation, can not refuse him such service. The theory of the defendant, on the contrary, is that the Salt River Valley Canal Company is in no sense a public agency, and possesses the right to dispose of the water it diverts, to its shareholders or to others, as it may elect, upon such terms and conditions as it may provide; that the plaintiff, not being the owner of a share of stock or a water-right deed, is not in privity of contract with it, and therefore has no right to require its service, or to compel it to furnish him water for the irrigation of his land. It is further contended by the defendant that the plaintiff has lost by abandonment his right of prior appropriation, and is now on the footing of a land owner who is not the owner of any water right in its canal or in the water which is diverted thereby. These conflicting contentions involve the consideration—First, of the status of the Salt River Valley Canal Company and its shareholders; second, the status of the plaintiff to the defendant company by virtue of his former appropriation of water by himself and his grantors under the various canals from which he obtained water for the irrigation of his lands prior to 1880, and his subsequent dealings with defendant company since that date. In the consideration of the questions involved, it will be noted that we have confined our examination largely to the statutes of the territory, and have not attempted to review the decisions of other courts relating to the same general subject. An examination of the statutes of the various states and territories where the doctrine of prior appropriation is recognized and enforced will disclose that the legislation of this territory differs fundamentally, upon the subject of appropriations of water for beneficial uses, from the legislation of other states and territories, with the single exception of the territory of New Mexico. Arizona, prior to its organization as a territory, constituted a part of the territory of New Mexico, but originally, and before the annexation under the treaty of Guadaloupe Hidalgo, and the subsequent purchase, un-

der the Gadsden treaty, of that part of the territory lying south of the Gila river, constituted a part of the state of Sonora. The first legislation by the territory followed closely the old Spanish and Mexican laws upon the subject of water rights, as these had been incorporated in the statutes of New Mexico. Under these Mexican and Spanish laws, enforced in the state of Sonora, the holding of land was the basis for any valid appropriation or use of water from a public stream. The community ditch, or "public acequia," as termed in the Howell Code, was the usual and ordinary means for the diversion of water. Each village or group of farmers constructed its own common ditch. The management and control of this ditch was regulated by law, and not by the agreements or contracts of the users of water under it. Such ditches were recognized and treated as public property, in much the same way that a public road under our laws is regarded. Hence every land owner under it, whether he used water or not, was required to contribute his quota of labor in the maintenance and preservation of the ditch. The law regulated the matter of priority of right upon the basis of land titles. The oldest titles, in times of scarcity, conferred upon the owners the prior right to the use of water from the public acequia. As we will see, the principles of the Sonora law regulating the rights of users of water from a public stream, diverted by means of a public acequia, were adopted; and in those sections of the statute of our territory which permitted the construction of private ditches, and their ownership by individuals, the same principles were recognized, to the extent that the ownership or possession of arable and irrigable land was made the basis of the acquisition and enjoyment of the right of appropriation. Whatever, therefore, may be the law as declared by the Supreme Court or Court of Appeals of Colorado, or the courts of last resort of other states and territories having a dissimilar history, or whose water laws have grown out of the local customs of miners, as in California and Nevada, these are not controlling and are not even authoritative in the decision of questions which arise, as in this instance, wholly and entirely under our own peculiar statutes. The various congressional acts pertaining to water and water rights, beginning with the act of July 26, 1866, have recognized the local laws, customs, and decisions of courts as controlling in the matter of the acquisition, enjoyment, and disposition of rights to the use of water on the public lands, and hence do not need to be especially considered.

As we have seen, the articles of incorporation of the Salt River Valley Canal Company were drawn under the general incorporation act in force at the time of the incorporation. This general incorporation act did not recognize ditch or canal companies as possessing rights and privileges beyond that of other incorporations. The professed purpose of the incorporation was to divert and deliver water from the Salt river for use upon the lands covered by it. The corporation, as an entity, has never been the owner or pos-

sessor of any land, except such as is included within its right of way. Under the law as it existed at the time of its incorporation, did it become, and did it acquire rights as, an appropriator of water? Section 22 of the bill of rights, which is to be considered simply as an act of the legislature, provided that "all streams, creeks and ponds of water, capable of being used for the purpose of navigation or irrigation, are hereby declared to be public property and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose." It may be contended that under this act a corporation was recognized as possessing the same right as an individual to appropriate water, and doubtless this is true, but the restriction provided by the legislature upon the subject of appropriations of water from a public stream apply alike to individuals and corporations. This is made clear when we examine sections 1, 3 and 7 of chapter 55 of the Compiled Laws, which were in force at the time the company was organized. Section 1 reads as follows: "All rivers, creeks and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining as hereinafter provided." Said section 3 provided "that all the inhabitants of this territory who own or possess arable and irrigable lands, shall have the right to construct public and private acequias and obtain the necessary water for the same from any convenient river, creek or stream of running water." Section 7 reads: "When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water or so much thereof as shall be necessary for said purposes," etc. It will be observed that in section 3 acequias or ditches are divided into two classes,—public and private. Other sections of the statute clearly define and set forth the nature, rights, and privileges of public acequias. In section 3 the ownership or possession of arable and irrigable lands is distinctly stated to be a condition precedent to the construction of an acequia, and the diversion of water for the same from any river, creek, or stream of running water. In said section the term "inhabitants" is used as descriptive of those who possess the right to appropriate water for agricultural purposes. In section 7 the term "person or persons" is used in a like connection. The word "inhabitants" is one of great variation of meaning. Primarily it refers to one who is an established or permanent resident of a particular place. An examination of the authorities shows, however, that it is frequently given a much broader meaning than this. * * * We think that, construing section 3 and section 7 together, a corporation is included among persons authorized and empowered to construct acequias and make an appropriation of water for agricultural purposes. The condition, however, upon which this may be done applies alike to individuals and corporations, in this: that both must,

in order to enjoy this right, own or possess arable and irrigable lands. The record shows that the Salt River Valley Canal Company at the time of its organization did not own or possess such lands. It succeeded to the property known as the south or middle extension of the Swilling Irrigation Company. This property consisted of a dam and canal, constituting a mere conduit for water. So far as the record shows, the company has never since its organization been the owner of any such lands. If, therefore, the ownership or possession of arable and irrigable lands is essential to the acquisition of a "water right," as it is called under the statute, then the Salt River Valley Canal Company was not at the time of its organization, nor has it ever been, an appropriator of water. If not an appropriator, what, therefore, is its status as a carrier of water? The definitions given of an appropriation of water have not been uniform. They, however, all agree in this: that it involves the idea of the use or application of water from a public stream for a beneficial purpose, under conditions prescribed by statute, or by custom having the effect of law, so as to vest a permanent right to such use and application. Such use and application necessarily involve, in order to constitute a permanent right, an equally fixed or permanent ownership or control of the means by which the use and application may be enjoyed. In the very nature of things, a conduit of some sort, by which water in a public stream may be diverted and conducted upon the land of the appropriator, is necessary. It has never been held that an exclusive ownership in such conduit is essential. Means of diversion may be owned in common by a number of appropriators, or such means may be owned by one person, and the appropriation of water by another, provided the latter has a fixed or permanent right, by contract or otherwise, entitling him to the service of such means for the purpose of his appropriation. The great cost of constructing dams and canals, and the maintenance of these when constructed, and the advantages in the way of conservation and saving of water which result on the erection and maintenance of large and permanent dams and canals, preclude the policy of restricting the ownership and control of such dams and ditches to actual appropriators. The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose. Such corporations have been organized, and their rights to the ownership and control of their property have been recognized, in all the arid states and territories. In some instances such companies have issued what are termed "water rights" to landowners, which give to the latter, on certain terms and conditions, a permanent right to the service by such companies through their canals of water for the irrigation of their lands. In other cases the practice has been to recognize the right of a stockholder to this service by virtue of his holding shares of stock. The land department of the government has recognized such a contract, under the desert land act of 1887, which re-

quired of an applicant for desert land, in order to obtain title, that he show his right, based upon bona fide prior appropriation, to the use of water to the extent necessary for the irrigation and reclamation of such land, as sufficient evidence of an appropriation to entitle one to acquire the title of the government. The appropriator may thus, immediately, by constructing and owning his own ditch or canal, or, mediately, by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation. A corporation thus organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, becomes the mere agent of the latter, and, under the statute, may divert from a public stream water which the latter may acquire and use for purposes of irrigation. The measure of its right so to do is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent. The doctrine of agency, therefore, unless we concede to such corporations a right not enjoyed by other inhabitants under the statute, must be invoked, in order to confer upon them any right to the diversion of water from a public stream. This precludes the idea that a corporation which constructs an irrigating canal for the purpose of diverting public waters acquires any rights beyond what it could acquire were it a natural person, and it must therefore connect itself by contract, unless it be the owner or possessor of arable and irrigable lands, with those who do own or possess such lands, before it may take into possession and under its control water which is dedicated by the statute to the public, and which is applicable for purposes of irrigation or other beneficial uses. The warrant for the diversion of water by incorporated companies which do not own or possess arable and irrigable land must be found in the fact that they supply actual users or appropriators. Their right to divert water from a public stream depends wholly upon the use which is made of it, and is measured by the rights of its users as appropriators. Such a company, therefore, is to be regarded as a mere agency by which appropriations of water made by the owners or possessors of arable and irrigable land are made effective. Water, being public property in a running stream, continues to be public property even when diverted for beneficial uses, and remains such until actually applied to such uses. Our statutes do not recognize the right of ownership of water, as distinct from its use or application. Whenever an appropriator of water ceases to use for a beneficial purpose any water which has its source in a public stream, his power or authority to control the same ceases. A corporation, therefore, which is not itself an appropriator, can not, by the mere ownership of the dam or canal, and by virtue of its diversion of water from a public stream by means of the same, become the proprietor or owner of public waters. Whenever, therefore, it does not connect itself in the diversion and carraige of water with those who have the right to make a beneficial use of the same,

it becomes, in a sense, a trespasser, and its diversion and carriage of such water are without authority of law. We do not mean to imply that a corporation may not lawfully divert and carry water, and supply the public generally, without regard to fixed, contractual relations with the consumers. Inasmuch as it is dealing with public property, the use of which is restricted to public purposes, it is nevertheless bound, in the distribution of the water it carries, to recognize the rights of its consumers as fixed by the statute. If it confines its service to the diversion and carriage of water from a public stream as the agent of particular appropriators of water, with whom it has fixed contractual relations, it owes no duty to others, whether appropriators or not. If, however, it undertakes to and does divert and carry water from a public stream, and undertakes to serve consumers of water, not as the authorized agent of particular appropriators, its status, not being that of an appropriator or the owner of the water it carries, must become that more nearly akin to the public acequia than the private acequia. When it ceases to become a private agency of particular appropriators, unless we recognize the right of such companies to the diversion of public water as exceeding that of a natural person, and concede to them ownership in the water diverted, it must follow that it becomes, in a sense, a public agency. Were it not for the fact that appropriators of water from a public stream do not have equal rights to the use of such water, but each appropriation, as against other appropriations, depends for its priority upon the time when it was made the status of a corporation undertaking to supply consumers of water for agricultural purposes, without regard to fixed, contractual relations, would become that of a public carrier. Some of the courts in the arid states have chosen to regard such corporations as, in a sense, public carriers. Inasmuch as, in the nature of things, their ability to supply the public with water must be limited, and as the consumers, under the law of prior appropriation, are not and can not be upon the same footing as to their rights to the use of such water, the statutory term, "public acequia," more accurately describes their character and status. At any rate, it is clear to us that the law governing public acequias, or the conflicting rights of independent appropriators from a public stream, must control such companies in the disposition of the water they divert and convey, to the extent that they must regard the maxim that, as between consumers, *"Qui potior est in tempore, potior est in jure."*

Having in view these general principles, we will now consider in what manner they apply to the defendant company. As we have seen, since the organization of the Salt River Valley Canal Company, and all through its history, its shareholders have been regarded as water-right holders as well; each share of stock being treated as carrying with it, as an incident to its ownership, a water right in the canal. As between the corporation and its members, and between the shareholders themselves, there can be no question but that such shares of

stock, and the ownership of the same, may establish all the rights to the use of water which would follow were the owners of such shares tenants in common in the canal, provided each stockholder claiming such right has made an actual application of it to a beneficial use. As said by the Supreme Court of Colorado in Combs *v.* Ditch Co., 17 Colo. 146: "Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert unappropriated waters of a natural stream. They may provide that their several interests in such an enterprise shall be represented by shares of stock." And as said by Mr. Justice Hayt, of the same court in Strickler *v.* City of Colorado Springs, 16 Colo. 61: "A stockholder in an irrigating company, who makes an actual application of water from the company's ditch to beneficial use, may by means of such use acquire a prior right thereto; but his title to stock, without such use, gives him no title to the property." Had the defendant company confined its diversion and carriage of water to the extent of supplying its shareholders who are the owners or possessors of arable and irrigable land, to the extent of their needs, as the mere agent of such appropriators, it would have remained a mere private ditch company, and would have owed no duty to others than its shareholders. As we have seen, for many years after the organization of the company it supplied others than its shareholders with water. After 1884 it restricted its service to its shareholders, and to those who obtained an order from shareholders, as the lessees of shares for particular irrigating seasons, but did not confine itself to supplying water for the irrigation of lands which its shareholders, as water-right holders, either owned or possessed. It respected the assumed rights of its shareholders to the extent of supplying those who might obtain the consent of such shareholders to use water called for by such water rights. At the time when plaintiff made his application to the company for water, the testimony shows that the company was undertaking to supply others besides its shareholders with water for the irrigation of lands which the latter neither owned nor possessed, upon the assumption that such shareholders were entitled, under their appropriation and water rights, to lease or assign them for particular seasons, to be used upon any lands whatsoever.

As we have seen, the statutes make the ownership and possession of lands essential to a valid appropriation of public water. A water right, therefore, to be available and effective, must be attached to the land, and become, in a sense, appurtenant thereto. It follows, therefore, so long as such water right is attached to a particular tract of land, it can not be made to do duty to other land. The law does not recognize that an individual appropriator of water, having a prior right to the use of the same, may, indiscriminately, by himself or others, make it apply, so as to retain its priority, to any land whatsoever. If a canal company is not an appropriator of water, and possesses no right as such, and if it may divert public water only for the purpose of supplying appropriators, and in thus doing must

regard the law of priority, a shareholder of such company, as such, can possess no right which is not enjoyed by the company. It appears, too, from the testimony that some of the shareholders whose orders were respected by the company were not owners or possessors of land, and hence not appropriators, under the statute. And, if an individual appropriator of water can not make his appropriation do duty to land to which it is not attached, his ownership of a share of stock in such company can not enlarge his right. The recognition, therefore, of these shares of stock as "floating" water rights is not warranted by law; and the practice, therefore, of the company of "selling water," as it is termed, for irrigating seasons, to persons who were not water-right holders in the company, upon the orders of shareholders, was the same, in effect, as though it had supplied such users with water without the consent of such shareholders.

The proof shows that plaintiff and his grantors have cultivated the land which he now owns from 1871 to 1880, under various canals in which plaintiff and his grantors were the owners of water rights. Since 1880, with the exception of one or two years, whatever water plaintiff has had for the irrigation of his land has been obtained from the Salt River Valley canal. The circumstances under which plaintiff changed his use from the Farmers' canal to the Salt River Valley canal are shown to have been the difficulty of maintaining the Farmers' canal, and the scarcity of water at its head, due to the diversion by the defendant company and other companies owning canals which headed further up the river. It is contended by the defendant that the abandonment of the Farmers' canal by its water-right holders, including the plaintiff, operated as an abandonment of their appropriations of water. Whatever may be the status of other water-right holders in the Farmers' canal, the defendant company, as late as 1890, in the suit known as "Wormser against the Salt River Valley Canal Company," tried in the court below, which case involved the rights of various canals in the Salt River Valley to divert the water from Salt river, acknowledged plaintiff's right as an appropriator of water, by setting up such right, introducing proof to the same, and obtaining an adjudication in its favor, sustaining its right to divert and carry water necessary for the irrigation of plaintiff's lands. If plaintiff had not lost his right as an appropriator of water by obtaining water from the Salt River canal from 1880 to 1890, it can not be very well contended that under the same circumstances his right was lost to him between 1890 and 1896, when he was first denied the right of obtaining water from the defendant's canal. Forfeitures are not favored in law, and we hold, therefore, that the circumstances under which plaintiff ceased to obtain water from the Farmers' canal, and his use of water from the defendant's canal, coupled with the acknowledgment as late as 1890 by the defendant company of his right as an appropriator, do not show such forfeiture, but, on the contrary, establish his status as a valid appropriator of water from the Salt river. We do not hold that the plaintiff has acquired any

contractual right to the service of said company which would entitle him to compel from said company the delivery of water for the irrigation of his lands, by virtue of such contractual relation, whenever the company confines its diversion and delivery of water to its stockholders to be used by the latter upon lands owned or possessed by them. On the other hand, we hold that his rights in the premises, so far as the defendant company is concerned, rest upon the fact that the defendant was not, at the time of plaintiff's application for water, confining its service to supplying its water-right holders for the irrigation of lands which they owned or possessed. In determining, however, whether plaintiff, as against others similarly situated, so far as the company is concerned, was entitled to the service of the company, under the law of prior appropriation, and the duty of water companies which occupy the relation of public agency in the diversion and carriage of water, we must look to the date of his appropriation, and therefore his priority of right. We think the denial by the defendant of plaintiff's application, under the circumstances shown by the record, was unwarranted, and he should have been accorded this right in preference to the holders of leases from the shareholders for use upon lands not owned or possessed by said shareholders, who were subsequent appropriators.

The importance of the questions presented by the record is such that we feel called upon to define with certainty the position we have taken, and to this end to give a brief resume of the points decided, with a statement of those which we do not decide, which grow out of a consideration of the points decided in a collateral way, although not necessary in arriving at the result reached: We hold that the ownership and possession of arable and irrigable land are essential, under the statutes, for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. We hold that a corporation not the owner or possessor of arable and irrigable land may lawfully construct a dam, canal, or other conduit of water, and divert from such stream water for purposes of irrigation, but that in so doing it becomes in no sense an appropriator or owner of the water so diverted. Its status is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform such service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water-right holders, or with whom it has not bound itself by contract to permanently render such service. If it confines its service as the private agent of certain appropriators, it can not be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contracts, and hence becomes a public agency, it can not, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation. We further hold that a share-

holder in such a company, who is also a water-right holder by virtue of his ownership of such share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water right, may not assign such water right to another, to be used upon lands which the assignor does not own or possess, for any particular season, so as to confer upon the assignee his priority of right, and that such company does not possess the right to discriminate in favor of such holders, as against other appropriators of water under its canal, who were prior in right. In other words, a water right, to be effective, must be attached to and pertain to a particular tract of land, and is in no sense a "floating" right. We do not wish to be understood as holding that a water right which is so attached becomes inseparable from such land. That is to say, we do not hold that a prior appropriator of water may not convey his prior appropriation to another, without the land, so as to confer upon his vendee of such water right all the rights which the vendor may possess, provided such vendee makes a beneficial use of such water right upon lands which he owns or possesses. But we desire to be understood simply as holding that, so long as a water right is attached to a particular piece of land, it can not be made to do duty to such land, and as well to other land not owned or possessed by such water-right holder, at the will or option of the latter. In the briefs, as well as in the very able and elaborate argument made by counsel for appellee, the right of shareholders to do this, and the duty of the defendant company to recognize the right, have been strenuously argued. In this, however, we think counsel confuses the right of an appropriator to sell or transfer by conveyance his water rights to another with the assumed right in question. To recognize the right of a prior appropriator to lease his water right independent of his land would, as we conceive, be subversive of the underlying principle of our water-right law. The right of alienation of a water right is one which is based upon the general right of property, and arises out of the necessity, in order that injustice may not be done to the owner, of permitting such alienation, for the reason that it frequently happens, through no fault of the owner, and by the operation of natural laws, that land to which water rights have been attached becomes unsuitable for cultivation. Floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and bowlders upon them; and other natural causes frequently render such lands not only unprofitable, but impossible of irrigation and cultivation. Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute. As the law must be certain and general in the matter of the right of conveyances, to admit the right of alienation under some circumstances must be the admission of that right under any and all circumstances. There was no principle of natural justice or of necessity that required the

recognition of the right of a water-right holder to lease his water right for particular seasons, while retaining the land to which it is attached; for so long as he may use his right in the cultivation of such land he enjoys all that the law confers in the first instance by virtue of his appropriation. In considering our peculiar statutes, it is well to bear in mind the fact that the only expression in our statutes upon the subject of priority of rights among appropriators from a common source for agricultural purposes is found in paragraph 3215 of the Revised Statutes, which reads: "That during years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors, the oldest titles shall have precedence always." And, while this section applies primarily to public acequias, it is significant, taken in connection with paragraph 3201, and negatives the idea that priority of appropriation is a mere personal right, which may be enjoyed otherwise than by its application upon particular lands. We hold further, therefore, that the defendant company, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable and irrigable land, not being itself an appropriator of the water carried, or the owner thereof, and dealing, as it was, with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not a water-right holder of the company, was entitled, upon the payment of the charge for similar service made to other nonwater-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other nonwater-right holders whose appropriations were subsequent in time, and that he is entitled to this service upon the same terms and conditions, so long as the defendant company continues to supply water to consumers under its canal who are not its water-right holders, whether upon the order of the latter or not, and thus continues to assume the status of a public agency in the diversion and carriage of water. We do not hold that the water-right holders in the Salt River canal are upon a parity of right with appellant and other nonwater-right holders similarly situated to the service of the canal and to the water it diverts and carries. We assert that the canal company owes a first duty to supply the needs and requirements of the water-right holders. It is the surplus water remaining in the canal after this is done which is lawfully available to the latter class, and which must be disposed of by the company in the manner herein decided. Under the circumstances shown by the record, we hold that the appellant was wrongfully denied water for the irrigation of his lands at the time he made his application, in May, 1899; it being shown that the appellee company during that season was engaged in supplying other consumers within the flow of its canal who were nonwater-right holders, and thus, confessedly, was divert-

ing and carrying water in its canal in excess of that needed and required by its water-right holders for the irrigation of lands to which their water rights were attached, and it being further shown that appellant had the superior right to the use of such surplus water over other nonwater-right holders thus supplied, by virtue of his ownership and possession of lands having an older right of appropriation. We further hold that, so long as appellant continues to be the owner or possessor of said lands, upon paying the usual and reasonable charge therefor, he is entitled to the same service, whenever and so long as the appellee company undertakes to and does divert and carry in its canal water from Salt river in excess of that needed and required by its water-right holders for the irrigation of lands owned or possessed by such water-right holders, and to which such water rights are attached. The judgment of the trial court is reversed, and a judgment and decree will be entered in consonance with this opinion.[44]

Doan, J., concurs.

Davis, J.: I do not concur in the opinion of the court in this case.

[44] "In the light of fuller discussion and a re-examination of the subject, we now hold, contrary to our holding in the Slosser case, that a canal company occupying relations to its consumers of water like that of the Maricopa Canal Company may not arbitrarily discontinue its service in whole or in part. While such a canal company, in the nature of things, can not be a common carrier, as that term is used in law, it is yet a quasi public servant. By an act of Congress, approved July 26, 1866, canal companies were granted rights of way for the construction of canals over the public domain. They were also given the right of eminent domain by our territorial statutes. The granting of these privileges presupposes a public use. Oury *v.* Goodwin, 3 Ariz. 255, 26 Pac. 377. As a quasi public servant, having received benefits from the public, such a canal company owes a duty to conduct its business as a carrier of water in such a way as may best promote the interests of the community, when this may be done without sacrifice of any of its rights of property. The community is interested in the permanent reclamation and improvement of lands. If a right of appropriation might be made of no use to its holder through the refusal of a canal company to divert and carry the water to which such holder is entitled, and which the canal company has theretofore diverted and carried, the holding of such right of appropriation by such a precarious tenure would not only impair its value to the holder, but would discourage the making of improvements and the putting of the land to which it is attached to its highest and best use. To the extent, therefore, that such a canal company has diverted and carried water from a public stream, and to the extent to which this water has been applied by appropriators for the necessary irrigation of their lands, the canal company must continue this service so long as such service is required by said appropriators and the water is available from the common source. Should the water not be available, of course the company can not suffer any liability to its appropriators, for the measure of its duty is its ability to comply with the reasonable demands of appropriators.

"In the case of the Maricopa Canal Company it appears that its practice has been at the beginning of each irrigating season to contract with such appropriators as may desire water for the ensuing irrigating season to supply such water in consideration of the payment of its charge for such service. It was argued in the brief of counsel for the canal company that if it be held that the canal company is obliged to furnish water to all landowners under the

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GABBERT, J.: Appellee Brown, on behalf of himself and others similarly situated, commenced an action against the city and county of Denver and others, the purpose of which was to adjudicate rights to the use of water from a ditch designated in his complaint, "The Platte Water Ditch," but more generally known as the "City Ditch." Various consumers appeared and were made parties. The pleadings are voluminous, and it is not necessary to give a synopsis of them, as counsel for all parties have assumed that they fairly presented the question sought to be determined, which was the respective rights of consumers of water from the city ditch, and we shall treat them accordingly. Part of the testimony was taken before Judge Armour, and thereafter an order was made, appointing a referee, who, by stipulation, was authorized to consider the testimony taken prior to his appointment, and to receive and consider such further testimony as the parties offered, and from this testimony formulate his findings of fact and conclusions of law, and, based thereon, report a decree. He performed his duties in these respects. Some of the consumers

flow of its canal heretofore irrigated by it, whether shareholders or lessees of the same or not, the practical result would be that the canal company might be required to furnish more water than it is capable of delivering. This view of the relations of the canal company to such landowners is not to be inferred from the above holding. If applications for water be made during any season in excess of the capacity of the canal to furnish it, the canal company would have the right, and, indeed, it would be its duty, to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation. In making its contracts for such service it can easily guard against incurring liability to appropriators by reason of the amount of water available from the Salt river being insufficient to supply their needs.

"Upon the authority of the Slosser case, as modified in this decision, the judgment of the court below will be reversed, and a decree will be entered in this court establishing appellant's rights as an appropriator of water to the extent needed for the irrigation of his lands, and requiring the appellee to deliver water to an amount not exceeding 70 miner's inches, being the maximum amount heretofore used by him for said purpose, upon the payment by appellant of such reasonable charge as may be established by appellee for its service and a compliance by appellant with the reasonable rules and regulations which may be established by said company in other respects; and that said canal company be required to continue to render said service under said conditions so long as it may possess the ability so to do without injury to the rights of other appropriators having prior rights of appropriation."—Sloan, J., in Gould *v.* Maricopa Canal Co., 8 Ariz. 429, 448-452, 76 Pac. 598, 601-602.

See Brockman *v.* Grand Canal Co., 8 Ariz. 451, 76 Pac. 602; Montezuma Canal Co. *v.* Smithville Canal Co., 11 Ariz. 99, 89 Pac. 512; Farmers' Highline Canal and Reservoir Co., *v.* Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Hagerman Irrigation Co. *v.* McMurry, 16 N. Mex. 172, 113 Pac. 823.

other than the City and County of Denver, being dissatisfied with the report of the referee, filed exceptions to the report, which the court afterwards heard and sustained in many particulars, and entered a decree from which the City and County of Denver has appealed.

* * * * * * *

In 1860 the Capitol Hydraulic Company was organized under a special act of the territorial legislature of Kansas. This act did not contain any limitation as to the period of the existence of the corporation it authorized to be created, and empowered it to divert the water from the bed of the South Platte river at any point selected between the Platte canyon and the mouth of Cherry creek, and conduct the water so diverted to the cities of Denver, Auraria, and Highlands for mechanical, agricultural, mining and city purposes. The purpose of the company was to construct a ditch to carry water to irrigate trees within the municipalities named, and also to furnish water to farmers cultivating land under the ditch. The construction of the ditch was commenced in 1865. In 1867 the name of the corporation was changed to the Platte Water Company. In 1875 or 1876 this company entered into a contract with the city of Denver, whereby it leased the ditch as then existing, with all its rights, privileges, and franchises, to the city, and also agreed to sell to the city the ditch and rights leased for the sum of $60,000, with interest, in six annual installments. These payments were made, and the city then became the beneficial owner of the ditch and such rights connected therewith as the vendor could convey. Prior to the commencement of the construction of the ditch, other ditches on the river were purchased by the original company. In 1883, under a statutory adjudication of water rights for the purpose of irrigation, the ditch was awarded priority No. 1, of date November 28, 1860, for so much water, 18 inches in depth, as would flow through a ditch having a grade of four and one-half feet to the mile, ten feet wide on the bottom and thirteen feet wide at the top; also two other priorities, dated respectively November 1, 1873, and March 7, 1881. It is not necessary, however, to state the volume awarded by these two priorities, as these matters are not material to any questions presented for determination at this time. It is the right to the use of water represented by these priorities which is involved.

The testimony introduced by the respective parties bearing on this subject is exceedingly voluminous, covering several thousand folios, and the abstract of the record proper and testimony consists of over 700 pages. It is evident the court disposed of the case upon an entirely erroneous theory, greatly to the prejudice of appellant, and perhaps other parties to the action, but, as the parties are numerous, and to go through the testimony with the care necessary to properly determine their respective rights would require a very considerable time, we shall only state in a general way so much of the testimony as may be necessary to direct attention to the material facts upon which the rights of the parties depend under the

rules of law applicable, it being our purpose to merely declare, in connection with the principal facts, such principles of law as will serve to point out the errors committed and enable the trial court, from the pleadings and testimony reported by the referee, to determine the material facts in detail and render a correct decree.

At an early date individuals began to take water from the ditch for the purpose of irrigating lands. The water thus obtained was secured under contracts entered into from time to time between this class of consumers and the then owners of the ditch. These contracts were only for the irrigating season during the year they were executed; that is, they only covered the irrigating season for the year they were made. The testimony discloses that in many instances, at least, the use of water by these consumers was intermittent; that is, they would contract for and use it a year or so, and then cease to contract for or use it for a period, when they would again resume the use of water in the same intermittent way. On this testimony the court held that these consumers were in no wise affected by the contracts made with either the city or its predecessors, for the reason that they were appropriators, to all intents and purposes, from the river, with the right in the city to exact a reasonable compensation for carriage, and that the rights thus acquired vested and continued from the date the consumers or their predecessors first utilized water from the ditch unless lost by abandonment. Error is assigned on this ruling.

The original company was organized to divert and carry water for mechanical, agricultural, mining, and city purposes, but, so far as any question is involved in this case with respect to the priorities awarded it, we think it and its successors in interest, so far as the rights of the individual consumers are involved, must be treated as an irrigation canal company, carrying water for hire.

Such a company is a quasi public carrier for the purpose of conveying water from natural streams to places where it may be applied to a beneficial use. It is not the proprietor of the water which it is entitled to divert, but must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their rights to appropriate water, as well as a private enterprise prosecuted for its benefit. Farmers' I. D. Co. *v.* Agricultural D. Co., 22 Colo. 513, 55 Am. St. 149; Wright *v.* Platte Valley I. Co., 27 Colo. 322; Wheeler *v.* Northern Colo. I. Co., 10 Colo. 582, 3 Am. St. 603; Wyatt *v.* Larimer & Weld I. Co., 18 Colo. 298, 36 Am. St. 280.

A consumer supplied with water by contract from a ditch owned and operated by a carrier company in a sense is an appropriator from the stream supplying the ditch, but does not occupy the exact status of an independent appropriator directly from the stream, as his rights are limited by the terms of his contract, so far as valid, with the ditch company, as well as other limitations which the law, from the nature of the relation between the carrier company and a

contract consumer from its ditch, imposes. Wright *v.* Platte Valley I. Co., supra; City and County of Denver *v.* Walker, 45 Colo. 387.

Having contracted for and beneficially used for irrigation purposes a specific volume of water for any particular year, without any valid limitation as to future use, he would be entitled to the same volume each year succeeding, when needed for the purposes of irrigation, upon tender annually, without intermission, of the rate which the company could lawfully exact, and compliance with its rules and regulations so far as reasonable. Northern Colo. I. Co. *v.* Richards, 22 Colo. 450; Section 2297, Mills' Ann. Stats. When, however, his contract expires by limitation and is not renewed, and he does not take the necessary steps to preserve the status growing out of his contractual relation with the carrier, his rights to a future use of water from the ditch can not be based upon past use. In other words, his contract with the carrier is for carriage, and his rights are limited by its terms, so far as valid, to the volume of water for the period mentioned in his contract. On the expiration of his contract, he may be entitled to have it renewed, unless inhibited by a valid provision therein; but, if a legal demand for that purpose is not made, he is in the same position as though he had never taken water from the ditch.

A consideration of the duties and obligations of carrier ditch companies conveying water for irrigation purposes for hire and the rights of contract users and others who can beneficially apply water from the canals of such companies to the irrigation of lands will demonstrate that the rights of contract users of water from companies of that character are measured and limited as indicated.

When such a company has water subject to its control, bona fide applicants are entitled to its use for irrigation purposes upon tender of the lawful rate for carriage and compliance with the reasonable rules of the carrier. Combs *v.* Agricultural D. Co., 17 Colo. 146, 31 Am. St. 275; Golden Canal Co. *v.* Bright, 8 Colo. 144; Wheeler *v.* Northern Colo. I. Co., supra.

As previously noted, the object of a carrier company is twofold, namely: to aid consumers in obtaining water, and for its private gain. When a mere contract consumer severs his relation with the carrier, the latter is not required, for that reason alone, to permit the volume which it had theretofore diverted from the stream for the benefit of the consumer to remain in the source of supply. If the rule were otherwise, and a contract consumer became an appropriator from the river, in the full meaning of that term, as held by the trial court, then the carrier would be compelled to await the pleasure of the contract consumer with respect to the use of water after once contracting with him, and its revenues would be dependent upon his whim, while others in the interim would be deprived of the use of the volume which the prior contract consumer had once utilized, but had ceased to use. The law does not permit such unjust and anomolous results to grow out of the relation of carrier

and simple contract users. The priorities awarded a carrier ditch are for the benefit of those entitled to use the water which they represent. This means those who are entitled to be supplied with water from the ditch, to which the priorities are awarded. When these rights are evidenced by a contract between the consumer and carrier for a specified volume for a specified period, the obligation assumed by the carrier is to deliver that volume for the period and purpose named in the contract. That is all the consumer contracted for. Such a contract is in no sense illegal or against public policy, and the consumer will not be heard to say that his contract conferred greater or different rights than those specified, save and except that, having once become a contract user, he will be entitled to continue that relation from year to year thereafter, without intermission, however, unless limited in the exercise of this right by a valid provision in his contract, upon tender annually of a lawful rate of carriage, and compliance with the reasonable regulations of the carrier. The rights of the contract consumer, as thus defined, afford full protection to all. When the consumer's contractual relations with the carrier are severed, the obligations of the carrier are ended, and the consumer can not complain because the rights of others have intervened by contract with the carrier for the use of water. That is their right, when the carrier has water undisposed of; and, if it refuses the request of bona fide applicants, it can be compelled to comply with their demands to the extent of their needs to the extent it has water which it can lawfully control. If a mere contract user becomes an unqualified appropriator of water from the river supplying a carrier ditch, then certainly he ought to be required to compensate the carrier for the carriage of water, whether he is using it or not; and yet we apprehend that when his contract expired, if the carrier should undertake to exact such compensation, his complete defense would be that his contract did not impose any such an obligation. The unjust results which would follow in ruling that a mere contract user is an unqualified appropriator make it apparent that his right is limited by the terms of his contract, so far as valid, and that when he voluntarily ceases, at the expiration of his contract, to exercise his right to continue his contractual relations with the carrier, or preserve the status growing out of that relation, that his future rights only date from the time he again contracts with the carrier for water, or makes a demand to be supplied with water in circumstances with which the carrier is legally bound to comply.

This conclusion logically leads to the further one that parties to the action who from their pleadings and proof did not establish that the city, as the beneficial owner of the ditch, was under any obligation to furnish them water at the time they became parties were without any rights which could be either adjudicated or recognized.

For a considerable period from the date contract users began to

take water from the ditch, it is by no means clear as to how much these consumers, other than the city, used. In 1874 the Platte Water Company began entering into written contracts with consumers, and passed a rule concerning the method of measuring water taken from the ditch, which was to the effect that the water should be measured through boxes located at right angles to the ditch, with a pressure of one inch above the orifice. The contracts thereafter executed with consumers were explicit with respect to the manner of placing the boxes, their length, grade, and pressure permitted in conformity with the rule mentioned, and limited the consumer to the carrying capacity of the boxes so placed for his use. After the city contracted to purchase the ditch, we think the evidence establishes that similar contracts were entered into between consumers and the city. All these contracts were entered into annually. The evidence discloses that many of the boxes were not maintained with a pressure of one inch, but in many instances at a much greater pressure, and that this was permitted by employees of the owner of the ditch, but without the knowledge or consent of the owner. It also appears that the excess water thus obtained was not contracted or paid for by the consumers, who, by the means mentioned, secured more water than their respective contracts called for.

The trial court, upon the theory that the contract consumers were appropriators from the river, awarded them the volume actually applied to their land, even though in excess of the volume contracted for. This was clearly error, for the reason already given, to the effect that the rights of these contract consumers were limited by their contracts so far as valid.

A provision in a contract between the consumer and carrier limiting the volume of water which the consumer is entitled to have delivered is valid. Drach *v.* Isola, 48 Colo. 134.

Some of the consumers of water or their grantors executed to the Platte Valley Water Company, before it sold to the city, right of way deeds, in which it was provided that: "The Platte Water Company, its successors or assigns, shall, from year to year, deliver water to the grantor, his heirs or assigns, for irrigation, if applied for on or before the 15th day of May of each year, under the rules, conditions and regulations governing the sale of water for irrigation, in 1874, to farmers under the ditch, but at a reduction of one-sixth of the rates charged for said year." The rights obtained by the grantors of such deeds, and their successors or assigns, are involved, as we understand from briefs of counsel that the court treated the grantors of such deeds and their successors in interest as appropriators whose rights continued from the date they first applied water to their lands, unless lost by abandonment. The stipulation mentioned does not bind the grantor to take water for any particular length of time, or in any specified volume. The company agrees to carry a sufficient volume to irrigate the land through which the right of way was granted, upon condition, however, that

the grantor applied on or before May 15th of each year. This does not obligate the grantor in any manner, but gives him a right more in the nature of an option, which he may exercise at his pleasure. If he declines to take water for any year, no liability attaches on account of his refusal, and no cause of action accrues against him as for breach of contract. In brief, the stipulation provides, substantially, for a continuous series of transactions in the way of annual contracts, which it is optional with the grantor to enter into. South Boulder & R. C. D. Co. *v.* Marfell, 15 Colo. 302. In order to protect this right as against others applying to the ditch company for, and securing water, and retain the status he occupied at the time the deed was executed and delivered, the grantor or his successors must have exercised the right reserved in the deed each year. In this respect he stands exactly on the same plane as any other contract consumer, and, if he neglects or fails to take water annually from the date his right to do so accrued, then his status with respect to other consumers would date back from the time he began to exercise uninterruptedly the right reserved in his deed.

While on the subject of considering the right of way deeds executed by certain appellees or their predecessors, containing the reservation above noted, we will consider the claim to the use of water made by the representative of E. J. Sanderlin, deceased. This claim was denied by the trial court. His representative contends that this was error. It is doubtful if the question is properly here for consideration, but it is not raised by counsel for appellant, and we will consider the matter on its merits. Sanderlin's deed was executed and delivered in 1874, and contained the stipulation to which we have referred. About three years later he sold his land through which the right of way was granted, reserving his water right evidenced by the stipulation in his right of way deed. According to his testimony, he applied to the company for water after he sold his land in 1878 or 1879, and thereafter, from time to time. His demands were refused. It appears that he did not have any land during all this period upon which the water he claimed to be entitled to could be applied, or that he could make any beneficial use of such water. In such circumstances, his demands were properly refused. An appropriator of water, or one having the right to utilize it for a beneficial purpose, is not entitled to have water turned out to him, unless he can beneficially use it. Not having any land upon which the water could be applied, nor any use for the water, it would have been waste to comply with his demands, and he gained nothing by making them. We think the trial court was right in denying this claim.

Error is also assigned upon the ruling of the court that deeds conveying land upon which water had been applied by contract consumers also conveyed whatever water right was thus acquired in connection with such land, regardless of whether there was any proof of a conveyance of water rights from the original user. This

question only becomes material in those instances where the contractual relation upon which the water right claimed is based continued without interruption between the grantor and ditch company, and thereafter between his grantee or successors and the company, and it is therefore only necessary to state the rule which governs in determining whether a deed to land conveys a water right.

Whether a deed of land conveys a water right in connection therewith depends upon the intention of the grantor, to be gathered from the terms of the deed or, where it is silent on the subject, from the circumstances surrounding the transaction. King *v.* Ackroyd, 28 Colo. 488; Bessemer I. D. Co. *v.* Woolley, 32 Colo. 437, 105 Am. St. 91; Travelers' Ins. Co. *v.* Childs, 25 Colo. 360; Daum *v.* Conley, 27 Colo. 56; Gelwicks *v.* Todd, 24 Colo. 495; Arnett *v.* Linhart, 21 Colo. 188.

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In 1894 the several consumers, including the city, were taking practically all the water the ditch could furnish. At that time the city provided in contracts entered into with the consumers that the use of water contracted for should be subject to the needs and requirements of the city as a user, and in many of them it was provided that the use should be only for the year mentioned in the contract. Generally speaking, these contracts were signed under protest, as water was refused consumers unless they signed contracts containing these limitations. This brings us to the consideration of two questions, namely: The validity of the limitations mentioned in the contracts; and whether the city, by gradually ceasing the use of water up to about 1899, lost any of its rights.

At the time the city was exacting these contracts, it was the beneficial owner of the ditch and had been for something like eighteen years. Its use of water as a contract consumer was continuous each year from the time it first began to apply water to the irrigation of shade trees on the streets of the city. When it became the beneficial owner of the ditch, this use was continued without interruption, except that some time in the 90's the volume it used was to some extent decreased. It intended, however, to resume the full use later. As stated, the contracts under consideration were executed subject to the needs and requirements of the city as a user. As to consumers entitled to water from the ditch by virtue of prior user, we think these conditions were invalid in so far as they related to the volume which such consumers were entitled to have turned out to them, for the reason that to this extent their rights had attached, and they could not be deprived of them unless they voluntarily consented. As to any excess water for which these consumers contracted by contracts containing these limitations, or as to those whose rights were initiated under these contracts, the limitations imposed must be treated as a lease of the water, the right to the use of which the city had theretofore acquired, and therefore to this extent are valid.

We are also of the opinion that the use of water under these con-

tracts by consumers, bound by the limitations imposed, preserved the status of the city the same as though it had utilized the water covered by these contracts for its own needs. In other words, by these contracts it leased its rights to the water which it had acquired as a consumer above that necessary for its present needs, and hence preserved them to all intents and purposes exactly as though it had continued the use of such water. Cache La Poudre Ir. Co. *v.* Larimer & Weld Co., 25 Colo. 144, 71 Am. St. 123.

In fixing the rights of the consumers, the trial court apparently awarded the early consumers or their successors the right to have the volume to which they were entitled supplied out of the first priority awarded the ditch; others the right to the use of the water from the second priority; and still others out of the third; and, in some instances, apportioned the rights of the consumers in all three of the priorities; that is, the rights of the consumers in the respective priorities appear to have been based upon the order their rights attached, according to the date of their respective contracts. It may be that, when the facts justify it, consumers of water supplied through the same ditch would have different priorities of right. Such, however, is not the general rule. On the contrary, all consumers, generally speaking, have the right to be supplied from all the priorities decreed the ditch through which they are supplied, whose rights by virtue of prior use aggregate the volume of such priorities, and in such circumstances stand upon an equal plane. In a case where the first appropriation decreed a ditch was designed for some particular purpose or enterprise, and later priorities awarded were to supply a different class or group of consumers from the first, then the later priorities would be as distinct as if used through separate canals, and the rights of the different classes of consumers would attach only to the respective priorities awarded for their respective use. What the testimony may establish on the subject of whether the several priorities decreed the ditch were awarded to supply distinct classes of consumers we do not express any opinion. If it does not, then the consumers, including the city, entitled to be supplied with water through the ditch in question, whose aggregate rights equal the aggregate volume of priorities awarded the ditch, stand upon an equal plane, and the water privilege of each extends alike to all the water decreed the ditch.

As stated in the early part of this opinion, we did not purpose going into the testimony in detail, in order to ascertain in what specific instance the decree of the court was erroneous; but, as it was clear the court had adopted an erroneous theory in disposing of the case, much to the prejudice of the appellant, we would refer to such material facts as were necessary to consider in announcing the rules of law which must be applied in fixing the relative rights of the parties to the action. We think, so far as we are able to gather from the briefs of counsel, that we have done so, and that from the pleadings and evidence the trial court, with the aid of

counsel, by a careful consideration of the very voluminous pleadings and testimony, can ascertain the facts upon which a decree should be based, in accordance with the views expressed in this opinion. We shall therefore vacate the judgment and decree of the trial court as to all parties to whom an award was made, but, as to those denied an award, the judgment and decree will not be disturbed, and remand the cause for proceedings as herein directed. In remanding the case for disposition as indicated, the court will dispose of it without any further pleadings or testimony, except, if offered, testimony to establish the relative rights of the parties in and to the respective priorities awarded the ditch should be received and considered.

In fixing the rights of individual contract consumers, the decree must provide, in an appropriate way, for the payment of lawful carriage rates, and that, while the decree will put in permanent form the relative rights of contract consumers, it must be borne in mind that these rights are based upon contracts, and that they may be lost, if the parties only intermittently avail themselves of the right to exercise and enjoy them. The decree should make appropriate provision in this respect, so that the city, as well as the bona fide applicants for water from the ditch in the future, may be fully protected.

Judgment vacated in part and cause remanded, with directions.[45]

MONTROSE CANAL CO. ET AL. *v.* LOUTSENHIZER DITCH CO. ET AL.

1896. SUPREME COURT OF COLORADO

23 Colo. 233, 48 Pac. 532

PER CURIAM: This is an action brought by the Montrose Canal Company and the other plaintiffs in error, in behalf of themselves and other users and appropriators of water through its canal, to restrain the Loutsenhizer Ditch Company, and all persons using water through its ditch, and W. J. Toland, water commissioner of district No. 41, from diverting or preventing certain waters of the Uncompahgre river from flowing into the Montrose canal, predi-

[45] See City and County of Denver *v.* Walker, 45 Colo. 387, 101 Pac. 348; Wright *v.* The Platte Valley Irrigation Co., 27 Colo. 322, 61 Pac. 603; Farmers' High-line, &c. Co. *v.* New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290; Wyatt *v.* Larimer and Weld Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. 280; Blakely *v.* The Fort Lyon Canal Co., 31 Colo. 224, 73 Pac. 249; Wheeler *v.* Northern Colo. Irrigation Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. 603; Farmers' High-line Canal, &c. Co. *v.* Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Mont. Rev. Codes 1907, §§ 4860-4863.

cating their right to such relief upon an alleged priority to such waters to the extent of 481 cubic feet per second of time, for the purpose of irrigation, and, aside from such priority, the right to fifty cubic feet per second of time for domestic use. It appears, *inter alia,* from their complaint, that on the 14th day of November, 1888, an adjudication of the priorities of water rights in water district No. 41, and of the ditches taking water from the Uncompahgre river, was had, wherein a priority of forty-eight cubic feet of water per second of time was decreed to the Loutsenhizer ditch in advance of and prior to any water being allowed to plaintiffs' ditch; and that the defendant company has ever since made claim to and taken from said stream that amount of water. To this complaint defendants demurred, upon the grounds, among others, that there was a misjoinder of parties plaintiff and defendant, and that the prior adjudication constituted a bar to the maintenance of the present action. The court below sustained the demurrer, and, the plaintiffs electing to stand by their complaint, judgment was rendered dismissing the action. From this judgment plaintiffs prosecute this writ of error.

The principal questions presented by this record have been determined by this court in decisions rendered since the commencement of this action. The ruling of the court below upon the ground of misjoinder of parties plaintiff and defendant is sustained by the decision in Farmers' Independent Ditch Co. *v.* Agricultural Ditch Co., 22 Colo. 513. It is therein held that, by reason of the number of consumers under ditches of this character, it would be impracticable to make them parties to a proceeding like the one before us; and that the ditch company itself is the proper party to maintain the action, it being trustee for its stockholders and consumers. The court said: "It necessarily follows from what has already been said that the plaintiff company has such an interest as will enable it to maintain this action, and it is unnecessary either to unite with it its stockholders or those who are receiving water through its ditch, or make the users of water under the defendant ditch or its stockholders parties defendant. A contrary construction would practically defeat the ends of justice, and close the courts to appeals from ditch companies which may be unlawfully and injuriously deprived of water to which they are entitled."

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We think the ruling of the court below on the demurrer was correct, and its judgment dismissing the action is accordingly affirmed. Affirmed.

FARMERS' CO-OPERATIVE DITCH CO. *v.* RIVERSIDE IRRIGATION DISTRICT, LIMITED ET AL.

1908. SUPREME COURT OF IDAHO

14 Idaho 450, 94 Pac. 761

AILSHIE, C. J.: This action was instituted by the Farmers' Co-operative Ditch Company against numerous appropriators of water from the Boise river, for the purpose of adjudicating the priorities among the several appropriators. The complaint was filed on August 20, 1902. The defendants answered, and also filed cross-complaints setting up their several rights, appropriations, and priorities, and asking for affirmative relief decreeing their several appropriations and the times from which they should date. After the commencement of this action, the trial court, proceeding under the authority of the act of the Legislature of March 11, 1903, Sess. Laws 1903, pp. 223-252, made an order directing and requiring the state engineer to make an examination of the stream and of all the canals and ditches diverting water therefrom, and of the lands irrigated thereunder and susceptible of reclamation therefrom, and to prepare a map showing the same, as specifically pointed out by section 37 of the act. The survey was made at a cost of about $11,000. After the completion of the survey and the plats were filed, the case was tried by the court without a jury. On January 18, 1906, findings of fact and conclusions of law and judgment were made and entered. This appeal is from the judgment, and is prosecuted by the Nampa and Meridian Irrigation District, which is the successor in interest and assignee of the Boise City Land and Water Company.

The first contention urged by the appellant is that the court erred in not finding as to all of the individual users of water under the various ditches and canals, and the amount of water used by each and necessarily required for the irrigation of his land, and the particular description of the land upon which he was using and entitled to use water. In support of this contention, counsel relies on section 38 of the act of March 11, 1903. That section, among other things, provides that the decree of the court shall be according to the rights and priorities of those using the waters, and shall be made to the use to which such water is beneficially applied, and that, when once decreed, the right shall become appurtenant to the land and become a part of the land, and that the "decree shall describe the land to which such water shall become so appurtenant." To our minds there are several reasons why the appellant's contention is not well taken here. In the first place, the appellant never raised this question in the trial court, and has never presented the same to the trial court, but, on the contrary, invited the error, if, indeed, it be error. The court in every instance has described the

lands either in the exact language of the complaint or cross-complaint, or by direct reference thereto. Such is true with reference to appellant's lands, and its decree allows it the amount of its appropriation for all lands under its ditch as described in its cross-complaint. In appellant's cross-complaint it alleges that the lands under its ditch susceptible of irrigation therefrom aggregate 80,000 acres, but does not describe that land by legal subdivisions. If appellant wanted a more specific description of its lands, it should have furnished the same to the court by its pleadings. On the other hand, if it wanted a more specific description made of the lands of other appropriators than is contained in the complaint and cross-complaints, it should have raised the question in a proper manner, and reserved an exception in the event the court ruled against it. It failed to do any of these things, and is therefore in the position of one who invites error, and will not be allowed a reversal of the judgment on that account. 3 Cyc. 242; Borden *v.* Croak, 131 Ill. 68, 19 Am. St. 23; Gumaueer *v.* Draper, 33 Colo. 122.

The question is also presented here as to whether section 38 of the act of March 11, 1903, is applicable to water users who have no right by appropriation, but whose right is founded upon one of use, and is purely a rental right, as distinguished from a right by appropriation and diversion. This action was originally instituted to determine the respective rights and priorities among the various appropriators and diverters of the waters of the Boise river, and the plaintiff only made such parties defendants as had constructed ditches and diverted water from the stream. As to some of those ditches the appropriators were also the users of the water. They owned the water right and used the water on their own lands. Others were co-operative ditch companies, where a number of water users had joined together and constructed a ditch, each one owning a number of shares in the company, which entitled him to a proportionate amount of the water of the canal; while by still other ditches the waters were appropriated and diverted, not for the immediate use of the ditch owners, but for the purpose of sale, rental, and distribution. Whatever the differences may be in the facts with reference to the use and application of the water, the ditch owners in every instance are necessarily the appropriators of the water within the meaning of the Constitution and statute. In Wilterding *v.* Green, 4 Idaho, 780, this court said: "A company or individual may appropriate and take out the water of a stream for sale, rental, or distribution, or for any beneficial purpose. When so taken out it becomes a public use, and the sale or rental of it for pay is a franchise." It is true, as intimated by this court in Hard *v.* Boise City Irr. Co., 9 Idaho 602, 65 L. R. A. 407, that the appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user applying the water to a beneficial purpose to enable a ditch company that has appropriated wa-

ters for sale, rental, or distribution to continue the diversion of the water. If it should cease to have water consumers or users, and cease to apply the water to a beneficial use, its right to divert the water would cease. That principle has been recognized by section 38 of the act above mentioned, wherein it requires that, where a company has works capable of diverting more water than it is then applying to a beneficial use, the decree shall not allow it to exceed four years thereafter in which to apply the water to a beneficial use.

It is most strenuously urged by the appellant here that the court erred in not ordering all these water consumers under the several ditches brought in as parties to this action for the purpose of determining and adjudicating their various rental rights. Counsel insist that they were indispensable parties. That contention is wholly unfounded. They would have been proper parties, and the court might, perhaps, have ordered any one or all of them in, and on application of any of the parties litigant the court would doubtless have made an order directing that they be brought in; but a failure to bring them into court in no way avoids or vitiates the decree as between the parties who were in court or participated in this action. The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water, after having "once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes," becomes a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. Section 4, art. 15, of the Constitution; Bardsly *v.* Boise Irr. and Land Co., 8 Idaho 155; Wilterding *v.* Green, 4 Idaho 773. A decree in favor of a water user from such ditch could not relieve him from any constitutional or statutory requirements; nor could it put him in any better position or condition than he already finds himself. His presence in the action is in no respect essential to the adjudication of the rights of the several appropriators from the stream itself. Any controversy he may have is with the ditch company from which he receives water, or with other consumers under the ditch over the question of priority of use. The appellant in this action answered the plaintiff's complaint, but made no suggestion of want of necessary parties. It also filed a cross-complaint, and made no offer or attempt to bring in any other parties; nor did it make any request to the court to order any other parties brought into the action. In view of these facts, it cannot now be heard for the first time on such objections in urging a reversal of the judgment.

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The judgment should be affirmed; and it is so ordered. Costs awarded in favor of respondents.

MELLEN ET AL. *v.* GREAT WESTERN BEET SUGAR CO. ET AL.

1912. SUPREME COURT OF IDAHO

21 Idaho 353, 122 Pac. 30

AILSHIE, J.: This action was instituted for the purpose of determining the respective rights of the parties to the use of water from a reservoir system in Elmore county known as the Great Western Beet Sugar Company system, supplied by three reservoirs impounding waters in what are known as Little Camas, Long Tom, and Rattlesnake reservoirs, and to determine the respective priorities of the parties to the use of water from that system.

It appears that the Rattlesnake reservoir was built in the years 1891 and 1892, and that the Long Tom reservoir was built in 1906, and the Little Camas reservoir at a still later date. Certain of the defendants have appealed from the judgment and decree, presenting two classes of claimants to the use of water from the irrigation system. It seems that prior to the construction of any of these reservoirs there were certain entrymen, living along what is known as Canyon creek, and who had appropriated water from that stream and Rattlesnake creek dating as far back as 1883, who had from time to time diverted water from the streams for the purpose of irrigating and flooding their lands for raising wild hay and grasses. The irrigation which had been carried on by these people was done by means of dams in the streams and diverting water into ditches and furrows which carried it out over the grass and hay lands, in varying amounts and covering varying areas, from year to year up to the time of the building of the first reservoir. In the springtime a considerable volume of water came down this stream; but later in the season, as early as June or the first of July, the water would become so low that very little, if any, reached the lands now owned by the appellants. This was due chiefly to the fact that after leaving the mouth of the canyon the water had to flow down over a sandy, gravelly, and porous formation for a number of miles before reaching the lands to be irrigated, and as a consequence seepage, percolation, and evaporation consumed practically all the water of the stream during the hot summer months. When the original promoter of the reservoir and irrigation system started upon the construction of the reservoir system, he entered into an agreement with the owners of these lands to the effect that they should surrender and release all their right, title, or interest in and to the waters of this stream, and in consideration thereof the company, known as the Elmore County Irrigation Company, should furnish them perpetual water rights for their lands. While the contract did not recite the extent of the water right the land owners were relinquishing, nor

did it describe the extent of the perpetual water right to be received, the only rational and just conclusion to be gathered from that contract is that the land owners were to receive water for the irrigation of the same lands that they had previously irrigated from the natural stream, and that this contract was made only for the purpose of enabling the reservoir company to collect all the waters flowing in the stream, instead of allowing them to run down the stream during the flood season, and in consideration thereof they should furnish water through the canal system sufficient to irrigate the same lands which had previously been irrigated from the waters of the stream.

The second class of appellants here are those who purchased water rights from this new reservoir and irrigation company. We shall deal with this latter class of appellants first. They were among the first purchasers of water rights from the irrigation company; but they did not actually settle upon or improve their lands until after subsequent claimants to water rights entered upon their lands, cleared them, and diverted and applied water to such land.

The appeal, so far as this class of appellants is concerned, depends upon the construction to be placed on sec. 5, art. 15, of the Constitution, which provides as follows: "Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental or distribution thereof, as in the last preceding section of this article provided, as among such persons priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe."

The appellants contend that the purchase of arid land under an irrigation or canal system and the purchase of a water right for such land in legal effect works an appropriation and dedication of the water to such land, and that these two acts constitute a compliance with the foregoing provision of the Constitution, in that they amount to a constructive settlement upon such lands.

It will be observed that the foregoing provision of the Constitution as to settlement and improvement of land is intended to be made the test in establishing the priority of the several claimants to water for irrigation purposes. This must of necessity be an actual settlement or an actual improvement. While there is such a thing as a constructive settlement on land for some purposes of the law, we know of no such thing as a constructive improvement of land;

but where the very thing to be determined renders it necessary that the settlement be an actual settlement—a *possessio nedis* as distinguished from a constructive possession—then it must be actual and not an imaginary one. And the same is true with reference to improvement. It is by these facts that the court is to determine which of the several claimants to priority in the use of water shall be awarded the better and prior right.

Appellants cite McDonald *v.* Welsh, 89 Cal. 42, in support of the contention that constructive settlement may suffice. That case is not in point here, for the reason that the appellant in the McDonald-Welsh Case made no pretense to having made a settlement on the land prior to the settlement made by the respondent.

The framers of our Constitution evidently meant to distinguish settlers who procure a water right under a sale, rental, or distribution, from that class of water users who procure their water right by appropriation and diversion directly from the natural stream. The constitutional convention, accordingly, inserted sections 4 and 5, in article 15, of the Constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution," and to point out the respective rights and priorities of the users of such waters. It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental, or distribution, it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so section 4 is dealing chiefly with the ditch or canal owner, while section 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.

It is plain that the framers of the Constitution in the adoption of section 5 meant to date the priorities of claimants from the time of "settlement or improvement." That is to say, that one who improves his land with a view to receiving water for the irrigation thereof, and who proceeds with diligence and in good faith to put his land in condition for irrigation, is entitled to have his priority date from the time he commenced to make such improvement. So, also, one who actually settles upon such land and proceeds with diligence and in good faith to prepare his land for irrigation is entitled to have his priority date from the time of such settlement. One who purchases a water right for his land from such canal or ditch company is placed upon exactly the same footing as any other user of water under that canal system. His priority can not date from the time of his purchase of such water right, but must date from the time he either settles upon the land, or from the time he begins to improve the land for irrigation.

So it will be seen that the purchaser of a water right from a canal company is in no better condition than he would have been had he not purchased such right, for the reason that he still is obliged to either settle upon or improve the land the same as one who has never purchased a water right.

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These conclusions necessarily result in an affirmance of the judgment as to those appellants who rely on contracts for water rights from the irrigation and canal company, and who do not connect themselves with an original appropriation of the water from the natural stream.

This brings us to a consideration of the question as to the rights of those appellants who claim by reason of original locations made by themselves or their predecessors from the waters of Canyon and Rattlesnake creeks. The court's findings and conclusions of law seem to be based on the theory that, if these appellants or their predecessors located on the land prior to the construction of the reservoir system, they did not therefore settle upon or improve the lands "with the view of receiving water" from the reservoir system "for agricultural purposes under a sale, rental or distribution thereof." This may be literally and technically true as a fact, and not be so as a legal conclusion. If these claimants or their predecessors settled upon and purchased their respective lands and appropriated and diverted water from Canyon creek for the purpose of irrigating such lands, and subsequently agreed with the irrigation company to waive and relinquish their water rights in consideration of receiving similar rights from the reservoir and irrigation system, then and in that case the water rights from the irrigation system are merely a continuation of the original appropriation, and their priority should date from the original diversion and appropriation. In this respect, we think the court's legal conclusions were entirely erroneous.

It appears quite conclusively that the original appropriators of the waters of Canyon and Rattlesnake creeks prior to the construction of the reservoir system continued from year to year to divert and apply water from the stream in varying quantities up to the time that they had their agreement or understanding with the irrigation company and the construction of the first reservoir. The evidence, however, is extremely conflicting and uncertain as to the use or application of water subsequent to 1891, and on this point the court finds as follows: "That ever since the building of said reservoir, they have ceased to use any of said waters so previously owned or claimed by them from said Canyon or Rattlesnake creeks under said rights except at such times early in the spring when a larger quantity of water flows down Canyon creek than can be carried by the supply canal from said creek to said reservoir, and the only waters used by them or their predecessors in interest from said reservoir are such as they have acquired by use as renters or under conveyance of water rights by deed from the owners of such reservoir."

If we were weighing the evidence in this case as a court of original jurisdiction, we are inclined to think we should find from the evidence in the record that some of these claimants have continued to receive and apply small quantities of water with sufficient frequency to entitle them to priorities for certain small portions of these tracts of land; but with the evidence conflicting as it is, and on the trial court having found against the appellants, we do not feel justified in disturbing the findings and judgment in this respect. It must be admitted that the use of water under these appropriations or from the canal system since 1898 has been intermittent and infrequent and with apparently less purpose of applying it to a beneficial use than to keep alive if possible the appropriation and priority. We therefore conclude that the judgment should be affirmed as to this class of appellants.

There are two other appellants, Smith and Moyses, who complain of the refusal of the court to decree them the priority to water for a seventy-acre tract of land known as a part of the Commodore Jackson desert entry on which the town of Mountainhome is built. They claim that this was taken as a desert entry in 1877, and that water was appropriated for it from Canyon creek in 1879. It is quite clear that water was conveyed to a large portion of this three hundred and twenty-acre desert entry; but the land here in question lies to the west side of the old town site of Mountainhome and west of the railroad track, and it is extremely doubtful if any water whatever has ever been delivered from this water right to this particular tract of land. It is equally evident that, if any water ever had been applied to this land, it was many years ago, and that such water right had long since been abandoned.

The record in this case is long and tedious, and we have been obliged to go through the entire record, and from such examination have reached the foregoing conclusions.

The judgment should be affirmed as to all the appellants, and it is so ordered. Costs awarded in favor of respondents.[46]

Stewart, C. J., and Sullivan, J., concur.

[46] See Hard *v.* Boise City Irrigation, &c. Co., 9 Idaho 589, 76 Pac. 331, 65 L. R. A. 407; Farmers' Irrigating District *v.* Frank, 72 Nebr. 136, 100 N. W. 286; Brose *v.* Nampa and Meridian Irrigation District, 24 Idaho 116, 132 Pac. 799; Idaho Const. art. 15; Kans. Gen. Laws, 1909, § 4432; Cobbey's Nebr. Comp. Stat. 1909, § 6842; Comp. Stat. of Wyoming, 1910, § 741; Rev. Codes of Montana, §§ 4860-4863, Henning's Gen. Laws of Cal., 1914, Act 5500, pp. 2189 et seq.

Section 4.—Priorities of Specific Uses

WATER RIGHTS

LEGISLATION

Colorado Const., Art. 16, Sec. 6.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Colorado Stat. Ann., Sec. 3178.—Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever; provided, that the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants to such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes.

Colorado Stat. Ann., Sec. 3179.—Any person claiming the right to divert water for domestic purposes from any natural stream who shall apply or knowingly permit the water so diverted to be applied for other than domestic purposes to the injury of any other person entitled to use such water for irrigation shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than fifty dollars and not exceeding two hundred dollars in the discretion of the court wherein conviction is had. Each day of such improper application of water obtained in the manner aforesaid shall be deemed a separate offense. Justices of the peace in their several precincts shall have jurisdiction of the aforesaid offense subject to the right of appeal as in cases of assault and battery.

Colorado Stat. Ann., Sec. 3175.—If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders or stockholders thereof, as the parties purchasing water therefrom, and parties taking water partly under and by virtue of holding shares, and partly by purchasing the same, to each his share pro rata, according to the

amount he, she or they (in cases in which several consume water jointly) shall be then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to which he, she or they should have received in case no such deficiency of water had occurred.[47]

Utah Comp. Laws 1907, Sec. 1288x27.—Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive the whole supply to which his certificate entitles him before any subsequent appropriator shall have any right: provided, that whenever the natural flow of any stream shall have receded in volume in the annual low water stage, then the rights of all users to such flow at such stage shall be deemed to be equal as to priority, and the water, when at or below such stage, shall be apportioned pro rata among said users. But in times of scarcity, while priority of appropriation shall give the better rights as between those using water for the same purpose, the use for domestic purposes shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

Kansas Gen. Stat. 1909, Sec. 4423.—In all that portion of the state of Kansas situated west of the ninty-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and secondly, to other industrial purposes; and may be diverted from natural beds, basins or channels for such purposes and uses: provided, that no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without the due legal condemnation of and compensation for the same; and natural lakes and ponds of surface-water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same.

[47] See Wheeler *v.* Northern Colo. Irrigation Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. 603; Farmers' High-line Canal, &c. Co. *v.* Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Farmers' High-line Canal, &c., Co. *v.* White, 32 Colo. 114, 75 Pac. 415.

MONTROSE CANAL CO. ET AL. *v.* LOUTSENHIZER DITCH CO. ET AL.

1896. SUPREME COURT OF COLORADO

23 Colo. 233, 48 Pac. 532

PER CURIAM: This is an action brought by the Montrose Canal Company and the other plaintiffs in error, in behalf of themselves and other users and appropriators of water through its canal, to restrain the Loutsenhizer Ditch Company, and all persons using water through its ditch, and W. J. Toland, water commissioner of District No. 41, from diverting or preventing certain waters of the Uncompahgre river from flowing into the Montrose canal, predicating their right to such relief upon an alleged priority to such waters to the extent of 481 cubic feet per second of time, for the purpose of irrigation, and, aside from such priority, the right to fifty cubic feet per second of time for domestic use. It appears, *inter alia,* from their complaint, that on the 14th day of November, 1888, an adjudication of the priorities of water rights in water district No. 41, and of the ditches taking water from the Uncompahgre river, was had, wherein a priority of forty-eight cubic feet of water per second of time was decreed to the Loutsenhizer ditch in advance of and prior to any water being allowed to plaintiff's ditch; and that the defendant company has ever since made claim to and taken from said stream that amount of water. To this complaint defendants demurred, upon the grounds, among others, that there was a misjoinder of parties plaintiff and defendant, and that the prior adjudication constituted a bar to the maintenance of the present action. The court below sustained the demurrer, and, the plaintiffs electing to stand by their complaint, judgment was rendered dismissing the action. From this judgment plaintiffs prosecute this writ of error. * * *

From the averments of the complaint, it sufficiently appears that the plaintiff ditch company was a party to the statutory proceeding, and that its rights were therein adjudicated. No reason appears why it should not be bound by the decree therein rendered. Certainly no facts are urged that entitle it to maintain the present action. It is, however, insisted that the complaint is sufficient to entitle the consumers under the plaintiff ditch to fifty cubic feet of water per second of time for domestic use, regardless of the priority of the defendant ditch to the use of water for irrigation; that the use of water for domestic purposes is recognized by the constitution as paramount to all other uses; and the mere averment that water is required for domestic purposes, and an attempt to deprive another of such use by diverting the water to any other purpose, is a sufficient statement of a cause of action. We think this claim is untenable. While it is true that section 6 of article 16 of the Constitution recog-

nizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state by means of large canals, as attempted in this case. The use protected by the Constitution is such as the riparian owner has at common law to take water for himself, his family, his stock and the like. And if the term "domestic use" is to be given a different or greater meaning than this, then, as between such enlarged use and those having prior rights for agricultural and manufacturing purposes, it is subject to that other constitutional provision, requiring just compensation to those whose rights are affected thereby. Strickler *v.* City of Colorado Springs, 16 Colo. 61; Armstrong *v.* Larimer County Ditch Co., 1 Colo. App. 49. In the Strickler case, this court in construing the constitutional provision referred to, as applied to water rights and antedating its adoption, said: "Our conclusion, therefore, is that the constitutional provisions relied upon were not intended to affect, and do not affect, prior vested rights, but that all owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected." We think the doctrine of that decision is equally applicable to the rights of prior appropriators for manufacturing or agricultural purposes acquired since the adoption of the constitution. To give the phrase "domestic use" the construction contended for by appellants would result in laying waste many valuable agricultural lands, and destroying manufacturing rights to the use of water, to the end that the same may be diverted for domestic use by communities settling at points remote from the source of water supply, although the water could only be taken to such distant points by long irrigating canals. This would require the diversion of many times the volume of water actually required for domestic use, as by far the greater portion of it would be lost as the result of evaporation and seepage. In the view we have taken of the foregoing questions, it becomes unnecessary to consider the objection urged against the sufficiency of the complaint in other particulars. We think the ruling of the court below on the demurrer was correct, and its judgment dismissing the action is accordingly affirmed.

Affirmed.[48]

[48] See Town of Sterling *v.* Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238; Broadmoor Dairy, &c., Co. *v.* Brookside Water, &c., Co., 24 Colo. 541, 52 Pac. 792; Colorado Milling and Elevator Co. *v.* Larimer & Weld Irrigation Co., 26 Colo. 47, 56 Pac. 185; Crawford Co. *v.* Hathaway, 67 Nebr. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. 647.

Cf. Idaho Const. art. 15, § 3; Wyoming Comp. Stat. 1910, §§ 725-726; New Mex. Stat. Ann., §§ 5734, 5735.

Section 5.—Transfer of Appropriation Rights. Loss of Appropriation Rights

SMITH *v.* O'HARA ET AL.

1872. SUPREME COURT OF CALIFORNIA

43 *Cal.* 371

By the court, RHODES, J.:

* * * * * * *

The plaintiff adduced no written evidence of the transfer to himself of the right to the ditch through which were conveyed the waters claimed by him, from those who had constructed it, or been in possession of it, but he proved by oral testimony that it was sold to him by Woods, the person, or one of the persons, who had constructed and used it. This evidence was properly stricken out by the court. But the court, in instructing the jury in respect to the appropriation and use of the waters of the creek, charged them in respect to the relative rights of Woods and the miners who used the waters of the creek. This was calculated to mislead the jury, by giving them the impression that the plaintiff had succeeded to the rights of Woods. The instruction, in that respect, was erroneous, and the defendants, in order to correct that erroneous impression, were entitled to have the instruction given which was asked by them, to the effect that the plaintiff could not connect himself with the rights acquired by Woods and Sedgwick except by deed. We can not say that this error did not injure the defendants, for it can not be ascertained from the record whether the jury found for the plaintiff upon his own appropriation and use of the waters, or upon that of Woods and Sedgwick.

Judgment and order reversed, and cause remanded for a new trial.[49]

CAVE ET AL. *v.* CRAFTS ET AL.

1878. SUPREME COURT OF CALIFORNIA

53 *Cal.* 135

The complaint alleges that the plaintiffs and defendant M. H. Crafts are, and since May 1, 1853, have been, the owners of a certain water ditch and water rights, extending from the south bank of Mill

[49] See Cal. Civ. Code, §§ 1091, 1629.

creek, through plaintiffs' farms, and that they have the exclusive right to divert water from said Mill creek for agricultural and irrigating puposes; that the defendant M. H. Crafts owns the right to use the whole of the water from 3 p. m. to 9 p. m. of Tuesday and Friday in each week, and no more, but he has been diverting the water upon other days, greatly to the injury of the plaintiffs, and the other defendants, having no rights in the use of the water, have been wrongfully diverting it, to the great loss of the plaintiffs. The complaint also sets out the individual interests of each of the plaintiffs. The prayer is for an injunction restraining defendant M. H. Crafts from using the water except during the hours designated, and to restrain the other defendants altogether. * * *

The court below found that the waters of said creek ran along what is called "Mill Creek Wash," and not upon the lands of the plaintiffs or defendants. That said waters had been diverted into the Mill Creek Zanje, and brought through said zanje to the "See," "Criswell," "Crafts," "Carpenter," and "Leffingwell" places, down to the lands known as "Cottonwood Row," and had been used for irrigation purposes. That these tracts were confirmed to Jose del Carmen Lugo and others in 1865, and the lands of "Cottonwood Row" passed from the original grantors long before any other. * * *

The court below gave judgment for plaintiffs for costs, and perpetually enjoined defendant Crafts from diverting said waters except for household purposes and watering stock, and except between three and nine o'clock p. m. on Tuesdays and Fridays of each week, and the defendants Byrne and Leffingwell were enjoined from diverting the water except for household purposes and watering stock, etc.

The defendants moved for a new trial, which was denied, and they appealed. The other facts are stated in the opinion.

* * * * * * *

By the court, McKINSTRY, J.:

* * * * * * *

It appears from the findings, that prior to the grant to the Lugos of the rancho, which includes within its boundaries both the lands owned by the appellants Leffingwell and Byrne, and those at Cottonwood Row owned by plaintiffs, the Mission authorities (who were agents of the Spanish and Mexican governments) had conducted the waters from the natural stream to Cottonwood row, and there employed them for purposes of irrigation; that this appropriation and use was continued by the Lugos until their conveyance to grantors of plaintiffs of lands at Cottonwood row, and by plaintiffs or their grantors until after the purchase of the Lugos title by appellants Leffingwell and Byrne.

Doubtless while the title of the whole rancho remained in the Lugos, they might have diverted the waters of the zanja anywhere within the boundaries of the rancho. But the Lugos, having continued the exclusive appropriation to the lands at Cottonwood row until the sale and conveyance of such lands, the question arises:

Did not the exclusive use of the waters attach as appurtenant to the lands at Cottonwood row, in such sense, that neither the Lugos nor their grantees of lands on the zanja above could divert the waters or deprive the owners of Cottonwood row of their accustomed use?

In Lampman *v.* Milks, 21 N. Y. 505, Denio, J., said: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burden existing at the time of sale."

It has been said that the rule as adopted in Nicholas *v.* Chamberlain is recognized fully by the courts of this country. Wood's Law of Nuisances, sec. 415. In that case, Cro. Jac., 121, it was laid down: "If one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, the conduit and pipes pass with the house, because they are necessary, *et quasi,* appendant thereto."

When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. "If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it, or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it." Phear on Waters 73.

There can be little doubt that throughout the entire possession of the Lugos the waters were conducted through the zanja to Cottonwood row, and for the purposes of irrigation. The use of these waters to the extent, at least, to which they had been previously employed, may have been, and it is fair to presume was the chief, perhaps only inducement to the purchase by plaintiffs and their grantors. To authorize judicially the diversion and material reduction of the waters, would be a violation of the principle that they took with all the apparent benefits and easements belonging to their purchase. And in cases like the present, the purchaser is entitled to the benefit of the easement without any express reservation or grant. Pyer *v.* Carter, 1 H. & N. Exch. and Exch., ch. 916. The word "appurtenances" is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment.

The incident goes with the principal thing. The idea and definition of an easment to real estate granted is, a privilege off and beyond the local boundaries of the lands or tenement conveyed—in the present case, the privilege of conducting the water through the lands retained by the Lugos, the common grantors of the plaintiffs and defendants, by means of the zanja. Angell on Water Courses, 153a; 97 Mass. 133; Goodrich *v.* Longley, 4 Gray 379. The parties at Cottonwood row having acquired their lands with the use of water, by means of the zanja attached, and quasi appurtenant to them, no subsequent act of their grantor could divest them of their right.

* * * * * * *

Judgment and order affirmed.

Mr. Chief Justice Wallace did not express an opinion.

FLICKINGER *v.* SHAW

1890. SUPREME COURT OF CALIFORNIA

87 *Cal.* 126, 25 *Pac.* 268, 11 *L. R. A.* 134, 22 *Am. St.* 234

THORNTON, J.: That the object to be attained by the agreement between Flickinger and Smith on the one hand, and the defendant (Shaw) on the other, was to acquire by purchase a right of way over the land of the latter for the ditch constructed by the first-named parties, is, in our judgment, a fair, legal deduction from the facts disclosed in this case. Flickinger and Smith were seeking to acquire something more than a mere license or authority to do a particular act or series of acts on another's land, without possessing any estate therein, Potter v. Mercer, 53 Cal. 673, and which right might at any time be revoked by the licensor. In this case, the agreement between the parties is, in substance, that Shaw gives the right of way for a ditch over his land; that Flickinger and Smith survey and excavate the ditch and keep it in repair, the ditch, when completed, to be used for the benefit of all the contracting parties in irrigating their respective tracts of land. Let it be observed (and it is so found) that Shaw agreed that Flickinger and Smith should have a conveyance of and give a right of way over his land for the ditch, and one-half of the water to be diverted thereby. The above facts clothe the transaction with the character of a purchase by one party and sale by the other of a right of way for a ditch. The license under which Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration. Under this agreement Flickinger and Smith did survey and construct the ditch, and kept it in repair, and both parties made use of it for the purpose for which it was constructed, viz., the irrigation of their lands. Thus the agreement be-

tween the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years. Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice. In Rerick *v.* Kern, 14 Serg. & R. (Pa.) 271, a case in some respects similar to the one under consideration, came before the Supreme Court of Pennsylvania. The case was one concerning the legal effect of an executed license. It was an action on the case to recover damages for diverting a water-course by which the plaintiff lost the use of his saw-mill. The facts were as follows: Kern, the plaintiff below, being about to erect a saw-mill on a stream designated as the "right-hand stream," a better seat for the mill was found by his mill-wright on what was termed the "left-hand stream." Kern thereupon applied to Rerick for permission to turn the water of the other stream into the left-hand stream, which was granted. In consequence of this permission, Kern built the mill on the left-hand stream. The mill was rendered a third more valuable by the union of the two streams than it would have been with the right-hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream, if the permission had not been given. In this case, as will be observed, there was no element of purchase. The defense set up was that the permission to Kern was a mere license, which was revocable under all circumstances, and at any time. To this, it was said, in the unanimous opinion of the court, by Gibson, J.: "But a license may become an agreement on valuable consideration, as, where the employment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract on payment of a compensation in damages is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence,

the judgment of a court of law operated on the right of a party and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy." The same rule has been applied in case of an executed license, in Pope *v.* Henry, 24 Vt. 565, and also in Swartz *v.* Swartz, 4 Pa. St. 358. The principle on which these cases proceed is, as was said in Swartz *v.* Swartz, supra, "that the revocation would be a fraud, and that to prevent it a chancellor would turn the owner of the soil into a trustee *ex maleficio*." The case under consideration presents a stronger ground of relief than either of these above cited. Principle and authority in our judgment show that the plaintiff has rights here which should be protected by injunction. The facts show plaintiff's right to a specific performance. The statute of frauds is not in the way. There has been part performance and possession under the agreement, as far as the plaintiff could obtain possession, and though the agreement rests in parol, under the circumstances above mentioned, a party is entitled to a specific performance. Rerick *v.* Kern, 14 Serg. & R. 272. To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of frauds to become the means of accomplishing a fraud. To complete the purchase, nothing remains to be done but the execution of a conveyance of the right of way, and a proper proportion of the water to Flickinger. His equity to a deed is perfect, Morrison *v.* Wilson, 13 Cal. 495, and, when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and as fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also. In conformity with these views, in our opinion, the judgment should be affirmed.

We concur: Beatty, C. J.; Fox, J.; Patterson, J.

I dissent: McFarland, J.

KENCK ET AL. *v.* DEEGAN ET AL.

1912. SUPREME COURT OF MONTANA

45 *Mont.* 245, 122 *Pac.* 746

BRANTLEY, C. J.: This action was brought to quiet title in plaintiffs to the use of the water flowing in Staubach creek in Broadwater county. They claim by separate rights. Plaintiff Kenck alleges an appropriation and diversion of 140 inches by predecessors in interest, in the early spring of the year 1866, for the purpose of ir-

rigating 160 acres of land in section 35 of township 9 north, range 1 west, and continuous use by his predecessors and himself, down to the bringing of this action. A second claim is predicated upon an appropriation of 100 inches which is alleged to have been made in May, 1893. Plaintiff Gravel alleges an appropriation and diversion of 100 inches, by a predecessor in the spring of 1866, to irrigate 160 acres of land in section 36, adjoining the land of Kenck, and like continuous use by his predecessors and himself, down to the bringing of this action. It is alleged that the defendants, claiming some right to the use of water from the stream, are diverting it therefrom and depriving the plaintiffs of its use, to their irreparable damage, though such rights as the defendants have are subsequent and inferior to the rights of plaintiffs. The complaint concludes with a prayer for a decree determining the respective rights of plaintiffs and defendants and fixing their priorities and amounts.

* * * * * * *

The plaintiffs have appealed from the decree and an order denying their motion for a new trial. The contention is that the evidence is insufficient to justify the findings as to the date and amount of plaintiffs' appropriations, and also that the award to defendant is excessive.

* * * * * * *

Two men, referred to by the witnesses as Doc Mann and Joe Barber, settled on the Kenck land in 1866 and made an appropriation of water as early as May of that year. One Northrop settled on the Gravel land about the same time and, by an agreement with Mann and Barber, extended the ditch constructed by them to his land to irrigate a portion of it. Thereafter, during the continuance of the occupation by these parties, all used the ditch in common. Other persons occupied these lands during 1867 and 1868 and used a small amount of water. In the spring of 1869 possession of both settlements was taken by one John W. Rodgers; subsequently a homestead patent was secured by him to the 160 acres in section 35, now owned by Kenck, and by proper conveyances Kenck is vested with his title and the appurtenant rights. At a date not shown, patent to the Gravel land was secured by one Wm. F. Hamilton. Gravel is now vested with the Hamilton title, with appurtenances. When, however, we come to connect the Rodgers possession in 1869 with that of the prior occupants, either by written or oral conveyances, we are unable to find any; nor are we able to find any connection between the Hamilton title and that of Rodgers or his predecessors. So far as can be ascertained from the evidence in this connection, Rodgers went into possession as a volunteer without having acquired the rights of those who preceded him, either by virtue of the law of succession or by conveyances. Staubach made his settlement in October, 1866. His appropriation was made in the spring of 1867, as early as some time during the month of March. He and his guardian have been in possession ever since,

Staubach having secured patent first to a pre-emption claim of 160 acres in section 2, and later to other land under homestead and desert entries in sections 2, 34, and 35. Under this condition of the evidence the court correctly found and fixed the date of the latter appropriation as of the time it was made in 1867. And though the appropriations of Mann and Barber and of Northrop antedated the inception of this right by a year, the plaintiffs having failed to put themselves in privity with them, the court properly fixed the date of the inception of plaintiffs' rights as of May 31, 1869, the earliest date at which Rodgers, the predecessor under whom they both claim, is shown to have been in possession.

While there is no presumption that any predecessor of Rodgers abandoned the Mann-Barber right or that of Northrop, the absence of this presumption can not supply the proof of privity with these rights through Rodgers, which the law requires the plaintiffs to show in order to establish their claims of succession to them. The mere possession by one person of a water right originated by another does not show such privity. In order to make good his claim to the right as of the date at which it was initiated, the possessor must show some contractual relation between himself and the original appropriator, or privity with him under the laws of succession. Otherwise the initiation of the right will be fixed as of the date at which possession was taken. Hays *v.* Buzard, 31 Mont. 74; Head *v.* Hale, 38 Mont. 302; Farnham on Waters, sec. 670a. The author cited states the rule thus: "The question whether or not one in possession of a water right at a given time, which was originated by another, has sufficient title thereto to enable him to protect and defend it depends upon whether or not he is in privity with the original owner. The rights of an owner of land claiming water as appurtenant thereto do not relate back to the inception of the alleged right in the appropriation made by the original settler of such land, where there is no proof of any contractual relation between his predecessor in title and such original settler, either directly or indirectly touching the settler's rights, and it is not apparent that his predecessor ever acquired such rights from such settler."

* * * * * * *

The judgment and order of the district court are affirmed.

Affirmed.

Smith and Holloway, JJ., concur.

HINDMAN *v.* RIZOR

1891. SUPREME COURT OF OREGON

21 Ore. 112, 27 Pac. 13

BEAN, J.: This is a suit to enjoin the defendant from diverting the waters of Alder creek, a natural water-course, which runs through the lands of both plaintiff and defendant. Both parties claim by prior appropriation. The facts are these: In 1863, the lands through which Alder creek flows were unsurveyed and unoccupied government land, and the waters thereof were free and unappropriated. In the spring of that year, J. W. Cleaver and one Peters settled upon the land now owned by plaintiff, and, for the purpose of rendering it productive and useful for agricultural and horticultural purposes, entered upon the unoccupied government land a short distance above the land occupied by them, and diverted a portion of the waters of Alder creek, and by means of a ditch conveyed the same onto their land for irrigating purposes. Cleaver and Peters continued to occupy and cultivate the land, using the waters appropriated by them, until 1865, when they sold their possessory rights and improvements. From the time of the sale by them until 1881, the land improvements and water right passed into the possession and occupancy of several different persons, each selling his rights thereto, and delivering possession to the purchaser, but no complete chain of title by deed of conveyance to either the land, ditch, or water right appears in the record. In 1881, the property having in this manner passed into the possession of one Rowley, he filed thereon under the pre-emption law, and, after perfecting his title conveyed the land, with its appurtenances, on September 15, 1882, by deed to plaintiff. In February, 1877, defendant settled upon the land now owned by him, above the land of plaintiff, as a homestead, and, having received his patent, claims the right to the use of fifty inches of the waters of the creek, as against plaintiff, by an appropriation made by him in 1877. He claims that because the title of the several parties occupying the land from Cleaver down to Rowley was acquired by the purchase of possessory rights merely, and not by deed, the water right was lost and abandoned; that a valid transfer of a ditch and water right can only be made by deed, and a verbal sale operates ipso facto as an abandonment; and that consequently his appropriation, made in 1877, was prior in time and paramount in right to that of plaintiff, which, in any view, could only date from Rowley's settlement in 1881. This is the only question necessary for us to consider. If plaintiff has connected herself by a proper title with the rights acquired

by Cleaver and Peters to the waters of Alder creek, her rights are unquestionably superior to those of the defendant; for whoever purchases land from the United States after the whole or some part of the water of a natural water-course, running through such land, has been appropriated by some one else, takes subject to the rights acquired by such prior appropriator. Kaler *v.* Campbell, 13 Ore. 596; Lux *v.* Haggin, 69 Cal. 255. If, however, her rights only date from the settlement of Rowley in 1881, the appropriation made by defendant in 1877 gives him a superior right to the quantity actually appropriated.

It is undisputed, from the evidence, that the land owned by the plaintiff has been improved, cultivated, and farmed each year, by the occupants and owners thereof, from the time of Cleaver's settlement, in 1863, to the commencement of this suit, and the waters appropriated by Cleaver and Peters has been used through the ditch constructed by them for the necessary irrigation of the land each year. In fact, without the use of this water the land would be of comparatively little value for agricultural or horticultural purposes, and the possessory rights thereto would not have sold for the several amounts disclosed by the record. It is dry and arid land, and can only be successfully or profitably cultivated by means of proper irrigation. It had been so improved that in 1881 Rowley paid to the occupant the sum of $1,500 for his possessory rights. Each owner and occupant of the land has used and claimed to own the water right acquired by the appropriation of Cleaver and Peters, and has delivered the possession thereof, with the other improvements on the land, to his successor in interest, as an incident to the principal thing sold. A settler upon the public land has a right thereto as against every person except the government, and, when such settlement is made with the view of obtaining title, such right is a valuable property right, which the courts will protect and enforce. Kitcherside *v.* Myers, 10 Ore. 21; Jackson *v.* Jackson, 17 Ore. 110. The right of such a settler being property, he may sell and transfer it, so as to pass his right thereto, and, except as against the government, vest the rightful possession in the purchaser. This right being a possessory one, merely, and not lying in grant, does not require a formal deed of conveyance, in order to effect a sale or transfer thereof. The settler does not acquire a title to the land by the act of settlement, but only the right to one upon his complying with the provisions of the law governing the sale and disposition of the public lands. His occupation and improvement, with a view to pre-emption, do not confer a vested right in the lands so occupied, but do confer a preference over others in the purchase of such lands by the bona fide settler, which will enable him to protect his possession against other individuals. He has no interest in the land which he can convey, but only in the possessory right thereto; and any mode of sale or conveyance which effects a transfer of the

possession from the vendor to the vendee is sufficient to pass his possessory title.

When such a settler appropriates water for the necessary irrigation of the land occupied by him, it becomes as much a part of his improvements as his buildings or fences, and can be sold and transferred with his possessory right in the same way. The principal subject-matter of such a sale and purchase is the possessory right to the land, and the consequent preference over others in the purchase of such land from the government; and such a sale, followed by possession taken thereunder, vests the possessory right in the purchaser, except as against the government, and he succeeds to the rights of the settler to the possession of the land and improvements. The water right being a necessary incident to the complete enjoyment of the land, the same principle which sustains a verbal sale of the possessory right to the land will also support a verbal sale of the water right in connection therewith, so as to enable a purchaser to maintain a suit against a stranger for interfering with the same. The water, when appropriated and used for irrigation, becomes an incident to the land, and a transfer of the possessory rights thereto carries with it the water, unless expressly reserved. The general rule is that, where a party grants a thing as it is then used and enjoyed, he, by implication, grants all those easements which the grantor can convey which are necessary to the reasonable enjoyment of the granted property, and have been and are at the time of the grant used by the owner for the benefit of the granted premises; and, if the grantor wishes to reserve any right over the easement, he must reserve it expressly. Gould, Waters, sec. 354; Cave *v.* Crafts, 53 Cal. 135. This rule, we think, is as applicable to the transfer of possessory rights to public land as to any other species of property. Thus, if a mill is erected upon public land, and water appropriated therefor, the sale of the mill and transfer of the possessory right to the land passes the water right to the vendee. McDonald *v.* River, etc., Co., 13 Cal. 220. So, the fact that the owner of the lower land acquired title through purchase of possessory rights merely, and not by deed, does not affect his title to the water rights, as they pass as appurtenant to the land. Geddis *v.* Parrish, 1 Wash. 587, 314. So, if a settler upon the public lands under the homestead law constructs a ditch for the purpose of conveying water onto his land for irrigating purposes, such ditches and water right become part of the realty, and are not severable therefrom, and are exempt from sale under execution. Faull *v.* Cooke, 19 Ore. 455. The fact that the settlers on this land after it was surveyed, and prior to its passing into the possession of Rowley, may have formally relinquished their pre-emption filings, does not of itself operate as an abandonment of the water right. This was the only means of effecting a complete transfer of their possessory right to the land, and giving their successors in interest an opportunity to acquire a title from the government. To consti-

tute an abandonment, there must be an intent to abandon. Dodge *v.* Marden, 7 Ore. 456. Such intent may be inferred from the acts and declarations of the party, for it is only by the acts and declarations of persons that we infer their intentions; but in this case there is nothing in the acts and declarations of the occupants of the land, or of the owners of the water right, indicating an intent to abandon it, but, on the contrary, their every act and declaration unmistakably evinces a clear intent not to do so. In fact, counsel for defendant did not claim that there was evidence indicating an intent to abandon, but he claimed that the verbal sale and transfer of this water right operated, *ipso facto,* as an abandonment thereof, and in support of his position cited and relied on Smith *v.* O'Hara, 43 Cal. 371; Pom. Rip. Rights, sec. 89; Gould, Waters, sec. 234. The statements by Pomeroy and Gould are based upon the doctrine announced in Smith *v.* O'Hara. In that case the plaintiff claimed as purchaser from the prior appropriator of a ditch used for conveying water for mining purposes, and undertook to prove the sale by oral testimony. The court held that a ditch, being an interest in real estate and lying in grant, could only be conveyed by deed, but that doctrine has no application to the case before us. In this case there was no attempt to convey the ditch separate from the possessory right to the land, but only as an incident thereto, and as part of the improvements thereon. It was an appurtenant to the principal thing sold, and passed as an incident thereto. We do not at this time undertake to question the doctrine that a ditch or canal itself, used for conveying the water to a mine or elsewhere, is an interest in land that can only be transferred and conveyed as in the case of other real estate, but we deny its applicability to the facts in this case.

Having reached the conclusion that plaintiff has succeeded to the title of Cleaver and Peters, and that the appropriation of the water of Alder creek made by them is prior in right to that of defendant, it only remains to ascertain the quantity of water to which plaintiff is entitled. The evidence on this question is not as clear as we would like. The amount of water diverted by Cleaver and Peters in 1863, from the best impressions we can gather from the evidence, was about eighty inches. This quantity does not seem to have been utilized by them during their occupancy of the land. They had a right to appropriate water sufficient for the present, and contemplated necessary irrigation of the land occupied by them, but the amount to which their prior right attached must be restricted to the quantity needed for that purpose. "It thus seems," says Mr. Justice Lord, in Simmons *v.* Winters, 21 Ore. 35 (decided this term), "that, in order to make a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and that the amount of water appropriated must be restricted to the quantity needed for the purpose." While Cleaver and Peters could rightfully appropriate water not only for the pres-

ent, but also for the future, needs of the land, the water so appropriated must have been utilized within a reasonable time in the purpose for which it was appropriated, or the right thereto was lost. What constitutes a reasonable time is a question of fact, depending upon the circumstances of each particular case. From 1863 to 1877, the date of defendant's settlement, there does not seem to have been used for the necessary irrigation of the land now owned by the plaintiff to exceed fifty inches of the water appropriated by Cleaver and Peters, nor does the acreage of the land in cultivation seem to have been materially increased since that time. This, we think, was a sufficient length of time in which to make an actual application of the water to the uses intended, and the right to the surplus not so applied became lost and abandoned. So that the amount of water being utilized in 1877—fifty inches—should be the limit of plaintiff's right. Although she has no property in the water of the stream flowing in its natural channel above the point of diversion, yet she has a most important right over it with respect to such water. She is entitled to have the water of the stream continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of her ditch, to the extent or amount of her appropriation, without diversion or material interruption, during the irrigation season, if she needs that amount of water for the necessary irrigation of her land. She is entitled to have in the natural bed or channel of the stream, at the head of her ditch, during the irrigating season, a sufficient quantity of water for the necessary irrigation of her land, not exceeding fifty inches. While she is entitled to fifty inches of water if necessary for the irrigation of her land, if she does not need that amount she must allow the surplus to remain in the stream, and can not complain if it is used by the other settlers on the creek, whether above or below her. At the time of the commencement of this suit defendant was diverting all the waters of the creek, while plaintiff's grain, vegetables, fruit, and other crops were suffering for want of irrigation. The decree of the court below will therefore be reversed, and a decree entered here in accordance with this opinion.[50]

[50] See McDonald *v.* Lannen, 19 Mont. 78, 47 Pac. 648; McDonald and Blackburn *v.* Bear River and Auburn Water & Mining Co., 13 Cal. 220; Watts *v.* Spencer, 51 Ore. 262, 94 Pac. 39; Turner v. Cole, 31 Ore. 154, 49 Pac. 971; Smith *v.* Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. 408.

DORR *v.* HAMMOND

1883. SUPREME COURT OF COLORADO

7 Colo. 79, 1 Pac. 693

BECK, C. J.: This was an adjudication before a referree, under the act of 1881 (Bromwell's Comp'n, pp. 580-590), of the priority of right as between the owner of the Hammond Slough ditch and the Robbins ditch to take water through their respective ditches from a certain slough on the north side of Cheyenne creek. The appellant, J. M. Dorr, is the owner of the Robbins ditch, and the appellee, J. H. Hammond, is the owner of the Hammond Slough ditch. Twelve witnesses were examined by the referee, and their testimony reduced to depositions and copied into the bill of exceptions. The referee found that the Hammond ditch was first in order of priority, and that the Robbins ditch was second in priority, and numbered them accordingly. Dorr filed exceptions to the report and findings of the referee, which were heard and overruled by the district court, and the findings and decrees of the referee approved.

The proceedings below appear to have been conducted in strict conformity with the statute, and if any errors have been committed by the referee they grow out of his judgment upon the weight of the testimony. That he erred in this respect we are fully satisfied, from a careful examination of the whole testimony. The land owned by Dorr is the south-west quarter of section 19. Hammond owns the eighty-acre tract adjoining, on the south side. The slough from which the water for both ditches is taken appears to extend from the west to or upon the eighty-acre tract. Both ditches appear to be taken out upon the Smith ranch, lying to the west,—the Robbins ditch on the north side of the slough, and the Hammond ditch on the south side of the slough. The testimony may be fairly said to establish the fact that the Robbins ditch was made in 1868, and that it has been used ever since, during the irrigating seasons, to carry water from the slough to and upon the south-west quarter of section 19, and that the right to take water from the slough through this ditch has been continuously claimed by the owners and occupants of this quarter section ever since its construction. So it is unnecessary to review the evidence upon this point.

The testimony also proves that a small ditch was taken out upon the south side of the slough, upon the eighty-acre tract, by Foster, one of the prior owners thereof, in 1866, and that it was used one season. The land then passed into other hands, and the testimony fails to show that the subsequent proprietors used, claimed, or even knew of such a ditch until the claim preferred by the present occupant, Hammond. The previous owners appear to have been Foster, Watson, Flannigan, and Hall, in order of time as named. Fos-

ter's testimony is to the effect that he made the ditch in the spring of 1866, used it during one irrigating season, then sold the land, and did not see the ditch for four or five years afterwards. He owned an interest in the Wolf ditch, which is taken out of Cheyenne creek, and which ditch covers the same land. His wife, Elizabeth Foster, says she was present when her husband made the ditch; that it was in the spring of 1866; that it was made by plowing one furrow, and cleaning it out with a shovel. Flannigan says he purchased the land from Watson in November, 1867, and sold it to Hall in November, 1870. Afterwards he acted as agent for Hall in respect to the land. During all this time it was watered from Cheyenne creek, and he did not know of the existence of the ditch now called the Hammond Slough ditch, or of any ditch taken out of the south side of the slough. If there had been such a ditch, he says he would have known it. He knows the Hammond ditch, but thinks it was made after he sold the land. He owned the eighty acres when the Robbins ditch was taken out,—interposed no objections, and claimed no priority. The testimony of Thomas H. Robbins is that he purchased the quarter section in the early part of 1867; lived upon it for six years; that he took out the Robbins ditch in March or April, 1868, and used it continuously until the spring of 1873, neither Flannigan nor Hall interfering with his use of the water, or claiming priority in respect to its use. He was familiar with the eighty-acre tract, south, and the Hammond ditch was not there while he owned and lived upon the quarter section, nor during the next year thereafter. He did most of his hauling over the eighty, and if there had been a ditch where it is now claimed to have been, it was so filled up that he never saw it. He says: "In the year 1869 we plowed where quite a portion of the present ditch is. I think it was in 1869; it might have been in 1868. Mr. Frank Flannigan owned, or had control of, this land at the time." John Wolf says he settled in the neighborhood in 1862, and has lived there ever since. He knows the slough, and both tracts of land; knows of the Robbins ditch being taken out of the north side of the slough, but don't know of any other ditch being taken out of the slough up to that time. He frequently passed over the ground, and thinks if a ditch had been taken out on the south side prior to 1868 he would have noticed it. The owners of the eighty-acre tract owned one-fourth of the Wolf ditch, and prior to 1868 the land was watered from that ditch. James Roberts testified that he passed backward and forward along Cheyenne creek for ten years, extending from 1860 to 1870. He knew the two tracts of land, and the slough. Part of the slough was formed from water than ran down from his residence, or land. He says there was no ditch on the south side of the slough during this period; he frequently passed by, and would have known it if there had been. Most of the table land of the eighty was irrigated from the Wolf ditch.

The testimony of the other witnesses, including that of the appellee, Hammond, is of later date, and of but slight importance upon the question of priority. The conclusion is irresistible, upon review of the whole record, that the right of priority acquired by Foster, by means of the furrow plowed by him to tap the slough in 1866, and his use of the water during that season, was afterwards abandoned. The testimony shows that no water was thereafter taken from the slough upon this tract of land for many years, and that the furrow mentioned became so obliterated as not to be noticeable by those driving over and plowing the land across which it had been run. The subsequent owners of the land interposed no objections to the appropriation of the water by Robbins, but, on the contrary, stood by and saw him construct his ditch, and permitted him for years to divert the water from the slough into it without ever notifying him of the prior appropriation. These facts amount to a voluntary yielding up and waiver of the priority acquired by Foster without any intention of resuming it, and constitute a clear case of abandonment. The Robbins ditch, then, should have been decreed priority over the Hammond Slough ditch, and numbered accordingly.

It is ordered that the decrees be modified in the particulars named, and that the appellee pay the costs of the appeal. Remanded.[51]

SIEBER ET AL. *v.* FRINK ET AL.

1884.* SUPREME COURT OF COLORADO

7 Colo. 148, *2 Pac.* 901

HELM, J.: * * * The remaining assignments of error question the sufficiency of the evidence to support the decree. Upon the principles of law governing the rights of the parties, counsel for both sides are in perfect harmony,—a circumstance which is especially gratifying, as the court has no fault to find with the legal doctrines thus agreed upon. The case was tried in the district court mainly upon proofs taken and reported by a master or referee. It is therefore our duty to "sift and weigh all the evidence, with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses." Miller *v.* Taylor, 6 Colo. 45. The record contains over 750 folios of evidence, and we can not analyze the same in this opinion; we shall content ourselves with a statement of the material conclusions of fact to be drawn therefrom. Plaintiffs aver priority

[51] See Green Valley Ditch Co. *v.* Frantz, 54 Colo. 226, 129 Pac. 1006; Dodge *v.* Marden, 7 Ore. 456.

of right to the water in controversy through what is known as the "Wilson and Brown ditch;" defendants base their claim thereto upon alleged appropriations thereof, by means of the "Old or Becker," and the "Edward P. Smith ditches." A fourth, called the "School Section ditch," is described in the testimony, and will command our attention. The Wilson and Brown ditch was constructed for the purpose of irrigating two tracts of land, owned by Wilson and Brown, respectively. Plaintiff Wheeler is the grantee of Wilson, and plaintiffs Sieber and Hudson hold title under a conveyance from Brown.

The priority of appropriation through the Becker ditch proper is practically conceded, though a suggestion of abandonment is made; it is probably the oldest connecting with the Antelope creek. We do not understand that plaintiffs complain of this appropriation of water; their contention is that defendants can not use this priority to sustain their right to water through the School Section ditch. We think plaintiffs are right in this respect. The head of the former is on Antelope creek; that of the latter is on Cottonwood, a tributary of Antelope; both being above the point of confluence of the two streams. The latter was constructed in 1875, yet water was diverted from Antelope creek through the former as late as 1878. From the evidence and maps we conclude that the former extends in a westerly, and the latter in a northerly, direction; they meet and unite, and the water from both may be used in irrigating the same tract of land. But there are two separate and distinct divisions and appropriations of water, dating at different periods; and the rights acquired attach upon the respective dates or appropriation. There is some conflict of testimony as to the time of appropriation through the Wilson and Brown ditch. We are satisfied that the ditch was commenced as early as April or May, 1871, and that it was completed and water turned in by or before the first of August. The appropriation would therefore date from April or May of that year. We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: "Although the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." Ophir M. Co. *v.* Carpenter, 4 Nev. 544; Kelly *v.* Natoma W. Co., 6 Cal. 109. Water was not appropriated through the Smith ditch until July or August of 1871. If, therefore, there has been no abandonment of the right required by means of the Wilson and Brown ditch, the prior right of plaintiffs over the appropriations through the School Section and Smith ditches is established.

Upon the question of abandonment, the testimony is by no means clear. From 1871 to 1875, according to the proofs, each of the three ditches constructed in 1870 and 1871 was neglected, and probably used but little during one or more of the seasons; but we can not say that the evidence sufficiently establishes an intention to abandon

either of them, or the right to water acquired thereby. A failure to use for a time is competent evidence on the question of abandonment; and, if such non-user continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs. The removal in 1876 of the head of plaintiff's ditch, and change of the point of diversion some eighty feet, does not affect their right of priority; both points of appropriation were upon the same stream; no change was made in the quantity of water diverted, and no one was injured by the removal; the use and the points of application to such use remained the same. But, it appears from the evidence of Wilson himself, that prior to 1876 no part of the water appropriated through the Wilson and Brown ditch was used upon any portion of the Wilson tract. Of the quantity applied to the irrigation of the Brown ranch we are not satisfactorily advised. There is some proof that water "ran to waste" at the end of the ditch; and it may be that in 1871, and during the succeeding four years, but a part of the water diverted was actually applied to a beneficial use upon the Brown land. If this be the fact, plaintiffs are only entitled to priority for the quantity so used. One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from the diversion thereof, one must, within a reasonable time, employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case.

Plaintiffs Sieber and Hudson are entitled to a decree of priority, and an injunction protecting the same for so much of the water appropriated through the Wilson and Brown ditch as was used previous to 1876, in irrigating portions of the Brown ranch, of which they are the purchasers. But to determine this quantity further proofs must be taken.

It appears that in the summer of 1876 the appropriation of water from the Cottonwood by the School Section ditch was enlarged. Such increase is subject to the right of plaintiff Wheeler as well as Sieber and Hudson, acquired in the early spring of that year, by the reconstruction of their ditch, and division therethrough. But we have no definite means of determining this quantity from the record; further testimony upon this point is also essential.

The decree will be reversed, and the cause remanded, with directions to the district court to take the necessary proof upon the two questions above mentioned, and enter a decree in accordance with the views herein expressed. The costs of the entire litigation will be equally divided between the plaintiffs and defendants.[52]

[52] "Appellant contends that, if the plaintiff or his predecessors in interest ever had any irrigation water right in said ditch, it was lost by abandonment. The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof

GRISEZA ET AL. *v.* TERWILLIGER

1904. SUPREME COURT OF CALIFORNIA

144 *Cal.* 456, 77 *Pac.* 1034

CHIPMAN, C.: Plaintiffs allege that they are owners in fee as tenants in common of a certain ditch and the right to take water from Little Shasta river, Siskiyou county, the ditch being commonly known as the "Musgrave and Linton ditch," and of capacity of 1,200 miners' inches; that they have for thirty-seven years last past used the water flowing through said ditch to its full capacity when there was abundant water, and at other times 640 miner's inches; that defendant claims an interest therein and adverse to plaintiffs; and that during the year 1900 she wrongfully diverted a portion of said waters from said ditch. Elizabeth J. Rohrer, as executrix of her husband's will, filed a complaint in intervention, alleging that at his death, in 1886, he owned a one-sixth interest in said ditch and water, and that said interest now belongs to his estate.

* * * * * * *

As conclusions of law the court found plaintiffs and intervener to be "the owners as tenants in common of three-fourths of the ditch and water right described in the complaint as against defendant and all persons claiming or to claim the same, * * * and that defendant has no right, title, or interest in the said ditch or water right or the waters flowing therein, or to any part of the waters flowing in said ditch;" that plaintiffs and intervener are entitled to a decree as prayed for, etc. Judgment passed accordingly. It should be observed that the one-fourth interest in the water not disposed of by the findings or judgment belongs without dispute to one Andrew Soule, one of the first appropriators of the water. Plaintiffs and intervener had the judgment from which and from the order denying her motion for a new trial defendant appeals. Ref-

without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Judson *v.* Malloy, 40 Cal. 299; Bell *v.* Mining Co., 36 Cal. 214; Moon *v.* Rollins, Id. 333; St. John *v.* Kidd, 26 Cal. 272; Richardson *v.* McNulty, 24 Cal. 345; Willson *v.* Cleaveland, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon, be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon."—Searls, C., in Utt *v.* Frey, 106 Cal. 392, 39 Pac. 807, 809. See also Gassert *v.* Noyes, 18 Mont. 216, 44 Pac. 959, 960.

erence to plaintiffs hereafter in the opinion will include the intervener.

* * * * * * *

It appears that the Musgrave and Linton ditch was begun by Samuel Musgrave and John Linton, and was completed by them, with the assistance of Andrew Soule and P. S. Terwilliger (defendant's husband), about the year 1861. There is evidence that Terwilliger was to have one-fourth of the water, and plaintiffs concede that he used water from this ditch up to a certain time, when they claim he abandoned all right to the ditch and water. He had an independent water right from the same stream by what was called the "Dorris Ditch," which covered all his land, and there is evidence that he at one time brought water to his home place from this ditch, and that water can now be so brought. Practically the controversy revolves around the fact as to defendant's present right to thirty inches of the water of the Musgrave and Linton ditch for use at this "home place," so called. Terwilliger died about the year 1895, and on July 20, 1895, conveyed the home place to his wife, with appurtenances. She claims through this deed, first, by reason of her husband's original interest in the Musgrave and Linton ditch, and, second, by adverse use for more than five years immediately preceding the commencement of the action. As to the latter claim little need be said, for there is much evidence, though not without conflict, that her use was neither uninterrupted, nor continuous, nor open, nor with plaintiffs' acquiescence. There is evidence that during these years the water was frequently shut off from defendant's land by plaintiffs, and she was forbidden to use it. There is abundant evidence to support the finding of the court against defendant's contention of adverse use.

The remaining question turns upon the admissibility and effect of certain testimony introduced by plaintiffs to which defendant unsuccessfully made objection as incompetent and irrelevant. Plaintiffs were permitted to prove that Terwilliger made a verbal sale to Musgrave, one of the co-tenants, of all his interest in the ditch and water, and that thereafter Terwilliger made frequent declarations that he had no interest in the water or ditch, and that this sale and these declarations were made long before he conveyed the home place to defendant, and his declarations to this effect continued up to the time of his death. Upon this question of abandonment of the use by Terwilliger the evidence is conflicting, but there was testimony from which the following facts appeared: That Terwilliger had some disagreement with his co-tenants about the water, and he determined to "get rid" of his interest, and did so by verbal sale to Musgrave for $50, which was paid to him; that thereafter Terwilliger stated many times to different persons that he had no interest in the water; that he obtained water from the Dorris ditch; that he exercised no control over the Musgrave and Linton ditch, took no part in its care or repair; that on some occasions he took

water from this ditch; that the original owners and their successors appropriated and used continuously all the water after Terwilliger surrendered his interest in the ditch; that the old ditch was partly filled up, and a new ditch substituted on another line by these owners, and that such water as was afterwards taken to the home place, now owned by defendant, was not taken under claim of right in Terwilliger's lifetime, but by permission of some one of the cotenants; that Terwilliger made an effort to obtain a permanent right for water to be taken for use on this home place from this ditch, but was denied the privilege; that when he disposed of his interest he intended to and did surrender and abandon all right he ever had. It is not entirely clear when this transfer took place, but by some witnesses it is stated to have been as early as in 1870 or earlier, and was not later than about 1880.

The objection made by defendant is that plaintiffs could not prove title by a parol sale, the interest conveyed being realty. Plaintiffs answer that the evidence was not offered to prove title, but as declarations against interest, and as showing abandonment, to defeat defendant's alleged title; and that the court did not admit the evidence to prove title. Mr. Kinney states the doctrine to be that the right to the use of the water acquired by prior appropriation, and the structure through which the diversion is effected, must be conveyed by a written instrument, as in the case of real property, and that a verbal sale is nugatory; citing cases. The author further says, however, that such a sale works an abandonment, and the vendee takes his right simply as a subsequent appropriator in his regular order with subsequent appropriators. Kinney on Irrigation, secs. 253, 255, 264. Mr. Pomeroy says that abandonment may be express and immediate by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, nonuse of them after completion, and the like. The general doctrine concerning the effect of abandonment is stated to be that the prior appropriator loses all his exclusive rights to take or use the water which he had acquired. "A verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment thereof. Such act shows an unequivocal intent on the part of the appropriator to give up and relinquish all of his interest, and, as it does not effect any transfer thereof to the attempted assignee or vendee, the only possible result is an immediate and complete abandonment." Pomeroy on Water Rights, secs. 96, 97. It is not necessary, we think, to invoke the rule as to an executed parol contract, such as arose in Flickinger *v.* Shaw, 87 Cal. 126, 11 L. R. A. 134, 22 Am. St. 234, nor to pass upon the applicability of the principle there enunciated to the present case. The evidence clearly was admissible to show abandonment, and may be restricted to that object, and, thus restricted, fully justifies the findings of the court. It was not admitted to prove title, as clearly appears from the ruling of the court. Defendant claimed through Ter-

williger, her husband, and offered evidence in support of her claim. It was competent for plaintiffs to show that long before defendant's deed, and continuously for many years, he had treated his right as abandoned, and his verbal sale was admissible as tending to establish this fact. The sale conferred no title upon Musgrave, but the subsequent use by him and his associates and their successors of all the water was an appropriation of whatever water Terwilliger was entitled to prior to the sale. His share of the water by his own act became publici juris, and was appropriated by others long before he attempted to recapture or again convey it. Plaintiffs' exclusive use of all the water, under claim of right, save only what Terwilliger and defendant used by permission or clandestinely, continued to the beginning of the action, a period of at least twenty years. We think the evidence was sufficient to support the findings.

It is advised that the judgment and order be affirmed.

We concur: Cooper, C.; Smith, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: Henshaw, J.; McFarland, J.; Lorigan, J.

SMITH ET AL. *v.* HAWKINS

1895. SUPREME COURT OF CALIFORNIA

110 *Cal.* 122, 42 *Pac.* 453

PER CURIAM: Action begun in October, 1892, to quiet the alleged title of plaintiffs to a dam, ditch and water right for the diversion of the waters of Wolf creek in Nevada county. As early as the year 1862, one John Ross was in possession of the ditch, and sold water from the same. The ditch claimed by plaintiffs is two-thirds of a mile in length. Its original capacity was 457 inches of water, though it seems to be now so filled up as to be capable of carrying about 100 inches only. Plaintiffs claim in virtue of a deed to them executed by Ross in March, 1888, which, for the purposes of the decision, we shall assume was sufficient to convey his title to the property in dispute. Since the year 1875 taxes have been annually assessed against such property, and paid by Ross and his successors, the plaintiffs. In 1890 it was leased by plaintiffs to persons who made no use of it, but who paid two months' rental therefor, at $15 per month. Defendant owns a piece of land lying below the head of the Ross ditch and riparian to said creek. One-fourth of a mile of the length of such ditch is on defendant's said land, and was there constructed before defendant settled on the same. He having acquired title to the land under the federal homestead laws, the patent therefor was issued to him

in 1891. In 1879 the defendant constructed a ditch tapping the creek about fifty feet below the Ross dam, and having a capacity of 200 inches of water under six-inch pressure; and by that means, for thirteen years next before the commencement of this action, continuously, uninterruptedly, with a claim of right, peaceably, and with the knowledge of plaintiffs and said Ross, defendant diverted such water to the extent of the capacity of his ditch, and used the same for agricultural purposes on his said land. For the period of five years and more next before the commencement of the action, the dam, ditch, and water right claimed by plaintiffs have not been used by Ross, or any one who has succeeded to his interest, for any useful or beneficial purpose. Neither he nor they have ever owned any property below the head of that ditch to which the water could be applied. For any purpose of profit, its use was contingent on its sale or rental to other persons, and this occurred very infrequently. The court found that plaintiffs are the owners of the property claimed by them; that enough water flows in the creek to fill both ditches to their full capacity; that the use of the water by defendant has not been adverse; that his rights to the water are subordinate to those of plaintiffs; and gave judgment in plaintiffs' favor. We think these conclusions are contrary to the evidence in several particulars.

1. The finding that, during the time defendant has diverted the water, an excess has flowed in the creek above the capacity of both ditches, finds support in an observation only of the judge of the court below, who visited the premises just prior to the judgment in the action (rendered April 3, 1893), and then saw water flowing in the creek as stated in the finding. This single observation, made near the close of the rainy season, is wholly insufficient to sustain the finding, in view of other uncontradicted evidence that during one season all of the water of the creek was taken in one of the ditches.

2. Plaintiffs' predecessor in interest appropriated water by means of his ditch, and conveyed it over and across the land of the defendant, which at the time of appropriation was a part of the public domain. While the rights of rival claimants and appropriators, as between themselves, had for a long time been recognized and adjusted, both by mining custom and adjudications in the state courts, it was not until 1866 that they met with federal cognizance and sanction. In that year the United States conferred upon those who had or who might thereafter appropriate water and conduct the same over the public land, a license so to do; and further provided that all patents granted, or pre-emptions or homesteads allowed, should be subject to any such vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as might have been acquired under or recognized by the act. Rev. Stat. U. S. secs. 2339, 2340.

An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be part of the public domain, is a licensee of the general government; but, when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land under an express grant. In this essential respect,—that is to say, in the origin of the title under which the servient tenement is subjected to the use,—one holding water rights by such appropriation differs from one who holds water rights by prescription. The differences are twofold: A prescriptive right could not be acquired against the United States, and can be acquired only by one claimant against another private individual. Again, such an appropriation, to perfect the rights of the appropriator, does not necessitate use for any given length of time; while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.

Section 811 of the Civil Code, discussing the extinguishment of servitudes, declares (subd. 4): "When the servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude." That this section can not in strictness be applied to rights under such an appropriation as we have been discussing becomes obvious when, as above pointed out, it is considered that there is no period prescribed for acquiring title to such rights. Section 811, therefore, deals with the extinguishment of servitudes resting upon prescriptive right,—a right vesting by reason of continued adverse enjoyment. Section 1411 of the Civil Code declares that the appropriation must be for some useful or beneficial purpose, and, when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. This section deals with the forfeiture of a right by nonuser alone. We say nonuser, as distinguished from abandonment. If an appropriator has, in fact, abandoned his right, it would matter not for how long a time he had ceased to use the water; for, the moment that the abandonment itself was complete, his rights would cease and determine. Upon the other hand, he may have leased his property, and paid taxes thereon, thus negativing the idea of abandonment, as in this case, and yet may have failed for many years to make any beneficial use of the water he has appropriated. The question presented, therefore, is not one of abandonment, but one of nonuser merely, and, as such involves a construction of section 1411, Civil Code. That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right, and the question for determination is, how long must this nonuser

continue before the right lapses? Upon this point the legislature has made no specific declaration, but, by analogy, we hold that a continuous nonuser for five years will forfeit the right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for nonuser; and, for analogous reasons, we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose. Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though, during the suspension of his use, other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great. The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action, as found by the court, results, from what has been said, in a forfeiture of their rights as appropriators. The judgment and order are reversed.[58]

SMITH ET AL. *v.* DUFF ET AL.

1909. SUPREME COURT OF MONTANA

39 *Mont.* 374, 102 *Pac.* 981, 133 *Am. St.* 582

CALLAWAY, District Judge: An extended statement of the case will not be useful. Suffice it to say that, while the District Court of Broadwater county was trying the cause, which seems to have involved all the waters of Crow creek, the appellants seasonably requested the court to find them to be the owners of the right to use the waters claimed by them by adverse user, rather than by appro-

[58] See Utah Comp. Laws, § 1288x23; Kans. Gen. Laws 1909, § 4430; Hagerman Irrigation Co. *v.* McMurry, 16 N. Mex. 172, 113 Pac. 823; Wyo. Comp. Stat. 1910, § 741; N. Dak. Stats. 1905, ch. 34, § 4; S. Dak. Stats. 1907, p. 373, § 46; Idaho Civ. Code, § 3264.

priation. The court refused to make any finding on the subject of adverse user. It gave appellants a water right based upon appropriation solely, which made them subsequent to many other appropriators on the stream. A decree having been entered, appellants moved for a new trial, which was denied. They then appealed to this court from the order denying the motion, and from the judgment. The respondents moved to dismiss the appeals, assigning several grounds of a technical kind. These we brush aside, because the grounds are purely technical, and because the law favors the right of appeal. A substantial compliance with the statutes and the rules of this court is all that is required. Payne *v.* Davis, 2 Mont, 381; Morin *v.* Wells, 30 Mont. 76; Butte Mining and Milling Co. *v.* Kenyon, 30 Mont. 314.

Appellants rely upon this point alone: They say the court erred in failing to act upon their request for a finding that they were entitled to the water claimed by them by adverse user; that, upon the evidence, it should have made such a finding in their favor. We have concluded that the court did not so err. The appellants having alleged themselves to be the owners of the right to use the waters claimed by them, the burden is on them to prove it. Rev. Codes, secs. 7886, 7972; Long on Irrigation, sec. 92; Talbot *v.* Butte City Water Co., 29 Mont. 17. Because of the nature of the right, the elements constituting it must be proved satisfactorily and unequivocally; and no doubtful inference will suffice. The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears a sort of kinship, by refined descent, to the "possession by bow and spear" of an earlier time; it is based upon a positive assertion of right in and by the water user in derogation of the rights of every one else. In order to constitute an ownership by adverse user, say the authorities, the use must have been open, notorius, continuous, adverse and exclusive under a claim of right, for the statutory period, which in this state is now ten years. See Talbott *v.* Butte City Water Co., 29 Mont. 17, and authorities cited. While the authorities use both the words "open" and "notorious," the use of either would seem to be sufficient, as they are practically synonymous when used in this connection, as inspection of the dictionaries will show. We advert to this because of the contention of counsel respecting the pleadings. Because of the conclusion to which we have come, we do not make further mention of the pleadings.

It is essential that the use be shown to have been adverse. Proof of the mere use of the water during the statutory period is not sufficient. It is necessary that during the entire period an action could have been maintained against the party claiming the water by adverse user by the party against whom the claim is made. Talbott *v.* Butte City Water Co., supra; Chessman *v.* Hale, 31 Mont. 577, 68 L. R. A. 410; Norman *v.* Corbley, 32 Mont. 195; Watts *v.* Spencer, 51 Ore. 262. In the case last cited, Watts *v.* Spencer, the Supreme Court of Oregon said: "The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right

of the person against whom the prescriptive right is asserted, and will give cause of action in his favor. Long on Irrigation, sec. 90. No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded. Wimer *v.* Simmons, 27 Ore. 1, 50 Am. St. 685; North Powder Co. *v.* Coughanour, 34 Ore. 9; Bowman *v.* Bowman, 35 Ore. 279; Boyce *v.* Cupper, 37 Ore. 256." See also, Bullerdick *v.* Hermsmeyer, 32 Mont. 541.

In Talbott *v.* Butte City Water Co., supra, this court said: "No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it invades no right of his, and can not even initiate a claim adverse to him." And in Norman *v.* Corbley, supra, it is said: "There is no evidence in this record that plaintiff did not have all the water required for his use from the date of its appropriation to the time this dispute arose, and the claim of a prescriptive right can not be maintained."

Upon the record before us it can not be said that appellants have proved that the use of the water has been adverse. They do not claim that there is any direct proof in the record that respondents were deprived of any water to which their appropriations entitled them, at any time when the respondents required it. They say the requisite proof is furnished by testimony showing that at low-water season each year they took all the waters of Crow creek, thus depriving others of it, and by a statement, which is found in the record, to the following effect: The fact was established without contradiction that there was need for the water of Crow creek taken through their ditch by appellants, and that, during the irrigation season each year, each of the parties to the action had need for the water awarded them by the decree herein.

It appears that Crow creek runs a large volume of water in flood time, reaching its maximum in the month of June. Then there is abundance for all. The creek begins to recede about July 1st, and decreases until the latter part of August, when the quantity is 700 or 800 inches, perhaps less. As the stream emerges from the mountains, it is tapped by several mining ditches which convey water to an auriferous bench, which lies westerly from Radersburg. This bench is seamed by a number of gulches leading into Crow creek, three of these being named Keating, Uncle Johnny and Charity. Placer mining has been done on this bench and in these gulches, beginning with 1867 and continuing to the present time. After the water was used for this purpose it flowed into Crow creek, whence it was taken for agricultural purposes. Appellants sought to prove that, after allowing two agricultural rights to be supplied, which they concede to be superior to their own, they took from the stream all the water at low-water season. They say that when the high water receded, and as early as July 15th each year, they diverted the water

by means of their mining ditches, used it for mining, and then conducted it to Keating gulch, in which they and their predecessors in interest have maintained a dam since and before the year 1884; from Keating gulch they conducted the water to their agricultural lands, and respondents never again became possessed of it. However, appellants' witnesses also testified that parties owning a ditch called the "Swede" ditch diverted large quantities of water from Crow creek for mining purposes. This water returned to Crow creek by way of Charity gulch and Swamp creek, a tributary of Crow, and thus became available to respondents. In addition to this, above the point in Charity gulch where the water of the "Swede" ditch was used, a dam was constructed for the purpose of catching up appellants' water to convey it to Keating gulch; mining in this gulch deposited quantities of tailings, and these were "sluiced out," thus allowing the water so used to run into Swamp creek. There was no dam in Uncle Johnny's gulch, and, when mining was carried on, the waters used there ran into Crow creek. The record is not clear as to when the mining ceases each year, but there is testimony to the effect that it sometimes continues into the first week of August.

Were it to be conceded that appellants have proved their contention that after a certain date in each year they have taken all the waters from Crow creek, still the proof falls far short of completing their case. In addition to the statement in the record above quoted, that during the irrigation season of each year each of the parties to the action had need for the water awarded them by the decree, there is found in the record finding No. 40: "That each and all of the parties who made appropriations of water within these findings set forth, except those designated as for mining purposes, have used the same each year since the date of their respective appropriations, for the irrigation of their lands, and the respective amounts of water are necessary for the proper irrigation and cultivation of said lands." This finding stands unattacked and uncomplained of.

There was testimony introduced by respondents tending to show that water sufficient to mature their crops had always been available. There was no testimony to show that any of the respondents' crops had ever suffered from the want of water. The evidence indicates that the respondents, or some of them at least, did not irrigate their hay lands after July 15th, which is the date which appellants fix as the time when they deprive the others of the water, and whether the respondents had any other crops which required water after that date is purely a matter of conjecture, upon the record. As appellants have failed to show in the first instance that their use of the water has been adverse, they are not in a position to avail themselves of the rule stated in Gardner *v.* Wright, 49 Ore. 609, and Gurnsey *v.* Antelope Creek Co., 6 Cal. App. 387, upon which they reply; and as they did not, upon all the evidence in the case, prove one of the most essential elements in their alleged right—it may be said the most

essential element, if any distinction is permissible—the court did not err in failing to find upon the question of adverse user submitted. The court can not be in error in refusing to do a useless act.

The motion to dismiss the appeals is overruled, and the judgment and order are affirmed.

Affirmed.

Brantly, C. J., and Holloway, J., concur. Smith, J., being disqualified, did not hear the argument, and takes no part in the foregoing decision; Hon. Llewellyn L. Callaway, District Judge, sitting in his place.

IN RE NORTH POWDER RIVER

1915. SUPREME COURT OF OREGON

(*Ore.*) 146 *Pac.* 475

MOORE, C. J.: At a rehearing of this cause, it was insisted that an erroneous conclusion was reached in the former opinion, wherein it was determined that the North Powder Mercantile and Milling Company, a corporation, could not change the point of its diversion of the waters of North Powder river to a point higher up the stream, when such change would injure water users between the original intake and the new point of diversion, since no testimony was received tending to show that any person would sustain injury by the change. The predecessor in interest and title of the corporation named secured on August 13, 1898, a decree awarding an appropriation from that river of 1,000 inches of water, miner's measurement, with which to operate a mill. North Powder Milling Co. *v.* Coughanour, 34 Ore. 9. It appears from the testimony that in the North Powder valley the arable land which can be irrigated produces excellent crops of wheat, a market for which is chiefly found at the flouring mill of the corporation at the railroad station of North Powder. The grain is usually harvested in August, and the farmers begin hauling the crop to the mill about the last of that month in each year. If the mill is started on the 1st of September and thereafter continuously operated, the entire crop is usually ground about July 1st of the the following year. The water is then shut off and the mill thoroughly cleaned and put in order so as to be prepared to grind the new crop when enough wheat has been received. For more than ten years prior to June 15, 1909, when James Dalton, P. L. Smith and J. D. McPhee secured a deed purporting to transfer to them a right to the use of 400 inches of water, it had been the constant practice of the North Powder Mercantile and Milling Company and its predecessor in interest to shut down the mill about July 1st of each year. The 1,000 inches of water which it had been using for ten months

was thereupon applied to a beneficial use by appropriators higher up the stream until September 1st, when they returned the water to the river in order that the mill might be operated. The corporation and its predecessor not having used any part of such appropriation during the months of July and August for more than ten years prior to June 15, 1909, the rights of other appropriators attached by prescription to the entire 1,000 inches of water which were not needed for milling purposes during July and August. The North Powder Mercantile and Milling Company had no interest in the 400 inches of water the use of which it undertook to grant to Dalton, Smith and McPhee. The testimony of witnesses opposed to such attempted grant shows that the water, when not used by the corporation, had been appropriated under a claim of right and continuously used adversely from the time the mill shut down each year until it started again. This branch of the case was tried upon that theory.

It is believed that the conclusion announced in the former opinion is correct, and we therefore adhere to it.

CHAPTER III

RELATIVE VALIDITY OF TITLES TO RIPARIAN AND NON-RIPARIAN RIGHTS AND LIBERTIES OF USE. EXTINGUISHMENT OF RIPARIAN RIGHTS

STOCKPORT WATER-WORKS CO. *v.* POTTER

1864. COURT OF EXCHEQUER, ENGLAND

3 Hurl. & Colt. 300

POLLOCK, C. B.: I am about to deliver the judgment of my brother Channell and myself. My brother Wilde, being no longer a member of the court, takes no part in the judgment; but it may be satisfactory to the profession to know that he had prepared a judgment founded on the principles which I am about to state.

The plaintiffs bring this action against the defendants for fouling the waters of the river Mersey.

The case is very voluminous, but a recapitulation of all the facts is by no means necessary for the purpose of giving judgment. It is enough to say that the plaintiffs have been in the habit of taking water by means of conduits, etc., from the River Mersey, at a point called the Nab Pool weir, ever since the year 1853. That the owners of the Woodbank estate (which estate bounds the river for some distance, including the spot where the Nab Pool weir is erected, and through which estate the conduits, tunnels, etc., by which the plaintiffs draw the water, pass), have also been used to draw the water at the same place for some years, perhaps it may be conceded for fourteen years, before the year 1853.

So that water has in fact been drawn at that point (it may be taken for the purpose of the argument) for more than twenty years before this suit. That the water so drawn has been used to supply the town of Stockport with water fit for household purposes and has not been returned to the river again.

It further appears that, in 1853, the owners of the Woodbank estate executed a deed under which the Stockport water-works and the use of the several conduits and tunnels, etc., by means of which the water has, during the period aforesaid, been drawn from the river at Nab Pool weir, were ceded to the plaintiffs.

Whether what has been called in argument "the right to take the water" at that spot from the river and carry it to Stockport to be there used by the inhabitants and never returned, was also granted to them, is a disputed question under the deed. The plaintiffs affirm that it was so granted, and the defendants deny it.

It is to be taken as a fact that the defendants have polluted the stream, and although the stream had, as early as 1853, "become more foul than formerly" from causes which have nothing to do with the defendants, yet, "the foulness of the stream was sensibly increased by the refuse discharged into it from the defendants' works."

There is, therefore, no doubt that if the plaintiffs have such rights in reference to the stream as to be entitled to insist upon its purity for practical purposes, the acts of the defendants constitute a cause of action.

But the defendants contend that, whatever others may have, the plaintiffs have no such rights. And they raise a variety of very formidable objections.

In the first place, the defendants argue that, although the right to pure water is the right of a riparian proprietor, the plaintiffs are not riparian proprietors at all. Nor are the plaintiffs the assignees of a riparian proprietor.

For, first, the law knows of no such right as the subject of assignment separate from the land in respect of which it arises, and, secondly, no such assignment has in fact been made.

And the defendants say there is no authority for the proposition that these rights in respect of water, which, in Embrey *v.* Owen, 6 Exch. 353, and other modern cases have been for the first time defined and attributed to the ownership of land by the side of a river, can be dealt with in gross and assigned in any way except in conjunction with such land.

And further, that if such rights could be the subject of transfer, they have not been in fact transferred. For the deed of May, 1853, never in terms affected to pass any such right, but only the water-works, with the use of the conduits, tunnels, etc., and a right to water power to be used for turning one or more water wheels; the water when used being returned to the river again. This turns on the construction of the deed and some general words contained in it.

The defendants also say that the rights even of a riparian proprietor himself would not extend to the abstraction from the stream of water for the use of a populous town situated on land in no way connected with such stream, and the conveyance of it away from the river side to a considerable distance for that purpose without returning it into the stream.

But then the plaintiffs' case, thus driven from a more exact basis,

is placed upon the fact that he and those under whom he claims have done the same thing for twenty years.

To this the defendants answer that the mere doing of a particular thing for twenty years will not necessarily give a right of action against anybody who interferes with its being done as beneficially as it hitherto has been.

The plaintiffs, thus pressed, contended before us that the right they claimed of having pure water come down the stream for them to abstract and use was an "easement" acquired by more than twenty years user, in which the Stockport water-works were the dominant tenement and the defendants' land the servient tenement.

Several answers were made to this. First, there was no continuing user for twenty years of a character to create an easement; for, before 1853, the user was by those who owned the land at Nab Pool weir, and was in exercise of their ordinary riparian rights.

Secondly, the case showed that this user had within the twenty years been objected to by another riparian proprietor, and litigation had ensued which terminated in an award, so that it was not adverse and as of right against all the other riparian proprietors.

But a third and conclusive answer, as it seems to us, was given to such an easement.

The defendants' land is far higher up on the stream than the conduit or tunnel at Nab Pool weir by which the plaintiffs abstract the water.

No amount of water abstracted by the plaintiffs or those under whom they claim could possibly be felt by the defendants. If the water was abstracted unlawfully or in excessive quantities, or not returned into the river the proprietors below might have cause to complain, but the defendants could not, because they could not be affected by it. They had neither the will nor the power to interfere with the plaintiffs' use nor to take legal proceedings against them.

No grant could therefore be presumed by the defendants because no user ever existed adverse to their full enjoyment of the water. And Sampson *v.* Hoddinott, 1 C. B. (N. S.) 590, 611, was cited as an express authority for this proposition.

We have thus recapitulated these arguments of the defendants because they appear to us to contain a perfect answer to the plaintiffs' claim in whatever light it can be put.

It is difficult to perceive any possible legal foundation for a right to have the river kept pure, in a person situated as this company is.

There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river the possession of which gives him his water rights, and at the same time trans-

fer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant.

It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor but not so as to sue other persons in his own name for an infringement of them. The case of Hill *v.* Tupper, 2 H. & C. 121, recently decided in this court, is an authority for the proposition that a person can not create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption of the right by a third party.

The case where a riparian proprietor makes two streams instead of one and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights.

We think then that in this case the right claimed can not be the subject of a grant so as to enable the plaintiffs to sue in their own name for an infringement.

Nor is the supposed easement founded on user much more defensible.

The dominant and servient tenements have no apparent connection with one another.

The abstraction of the water from the stream took place at a spot situated on other land than that now called the dominant tenement, and in no sort of way affected the enjoyment of the water at what is now called the servient tenement.

If the water-works could be considered a dominant tenement, every house in Stockport to which the water flowed through pipes might equally be so.

And as in modern times water is often conveyed many miles under ground in pipes for the supply of large towns, the dominant and servient tenements might not only be many miles apart, but have no other connection with each other than the artificial one created by miles of pipes.

For these reasons we think that it is unnecessary more closely to investigate the effect of the deed of 1853 or to give any other reasons than those already stated, as upon the broad points of the case, the defendants are in our opinion clearly entitled to judgment.

BRAMWELL, B.: In this case the plaintiffs can not rely on their mere possession of the water they take, or perhaps I ought to say on their mere taking of it. For whatever Whaley *v.* Laing, 3 H. & N. 675, 901, may have decided, it certainly decided this, that such possession was not enough to enable the possessor to maintain an action. For that case decides that the plaintiff had not alleged, or having alleged had not proved, a right to the water, and so could not recover. Nor can the plaintiffs rely on the more than twenty years user as giving them any right. They themselves have not enjoyed the water twenty years, and their enjoyment can not be connected with the antecedent enjoyment of Messrs. Marsden. For that enjoyment was an enjoyment as riparian proprietors, which might give a right beyond the natural right against owners below whom it affected, but could not give any right against the riparian proprietors or others who were not affected by it, and could not have resisted it.

The plaintiffs, therefore, must rely on the grant from Messrs. Marsden; and upon that two questions arise. First, is a right conferred on the plaintiffs? Secondly, can they maintain an action in respect of an injury to the enjoyment under such right? On the first of these two questions there seems to me no difficulty. It is not necessary to examine the deed minutely. It is enough to say that the reservoir is granted and conveyed, and a right to have water from the river to it. If any right can be granted which will enable the grantee to maintain an action like the present, this is a sufficient grant. It is true that this is not the claim in the declaration, but that may be amended by agreement of the parties to raise the real question, and should be, if necessary. The case then is reduced to this. Can a grantee from a riparian proprietor of land, part of the former riparian estate, but separated from the stream by land of the grantor not included in the grant, with a grant from the grantor of a right to lay pipes from the stream to the granted land and take water by means of them from the stream to such granted land, maintain an action against a person who fouls the stream? It is strange that this question should arise for the first time. There can be no doubt that the grant as between the riparian grantor and the grantee is good. And there is this to be said in favor of supporting the present claim, that we must suppose that the grantor and grantee have found the arrangement to be to their mutual advantage, that the stream can be more beneficially used this way than otherwise. Consequently that such an arrangement is for the public good. Why, then, should it not be effectual against a person, who as against the riparian proprietor is a wrongdoer? It imposes no additional burden on the riparians or others above. If they are wrongdoers by fouling now, so were they before. They could be restrained by injunction before if they can now. No doubt they might be made liable to larger damages than they

would have been before, but their rights are not altered. It was said that innumerable actions might be brought if the law were as the plaintiffs contend. But there are two answers to this, one practical, viz., that they would not be brought, the other that the same might happen now if the smallest portion of the bank was granted with the right. A similar answer may be given to the supposed difficulty of the riparian proprietors above desiring to buy up rights below. The power to make such a grant then is for the benefit of the grantor, and grantee, and the public; and the only prejudice by it to the riparian or wrongdoer above is the liability to greater damages and to an action and injunction at the suit of persons additional to the riparians below. But this consideration could not preclude a covenant by the grantor that the grantee might apply in his name for an injunction or sue in his name, nor would it preclude a grant of the part of the bank where the water was taken, in which case it is clear the grantee might maintain an action or obtain an injunction. And this suggests to me the remark that what may be done indirectly may be directly. Further, it does seem strange that if a man has an estate on the bank of a stream extending a mile from it, he may build houses on the land, conduct water from the stream to them, and maintain an action and recover substantial damages for the injury to each house; that his tenants of each, if he let them, might do the same even though he demised them for 1,000 years at a peppercorn rent, but that if he grants away the house in fee with the right of water, such grantee can maintain no action. What is to happen if he does so and repurchases? What would be the case if a riparian proprietor added to his estate another, to which water had been so conducted? Suppose a riparian proprietor on both sides for a great length wholly alters the course of the stream, could he not effectually complain of a fouling of the water in the new course? Suppose besides the new course he allowed the old one to continue, the stream running in both, could he not then maintain actions for the damage done to either? If he could, could not his grantee of lands on the new stream, and if such grantee could, why can not the plaintiffs?

If the defendants' argument is well founded, it will follow that where the owner of land on a stream has built a mill alongside the stream with a cut or lead to it, and sells the mill, but not the natural watercourse, the owner of the mill can maintain no action against a riparian owner above who abstracts the water. I can not think this is so. Further, suppose the person fouling the water was not a riparian proprietor but a mere wrongdoer, why should not an action lie against him? I can see no reason, nor can I see that his being such proprietor makes any difference. Upon these various considerations it seems to me this action is maintainable. I think it may fairly be asked to what extent I would carry the principle upon which I decide this? My answer

is, to the extent to which the analogous case extends of a grantee of a right of way. Where a grantee of a right of way could maintain an action for disturbance of his way, so do I think the grantee of a right of water might. This case of the right of way, and cases of right of common, seem to me analogous to this case and authorities for my opinion. I am of course aware of the case of Keppell *v.* Bailey, 2 Myl. & K. 516, and agree that new rights of property can not be created, but I think that rule does not interfere with the present case. There, an owner of land was resisting a burden put on it by a former owner, and it was held that burden could not be attached to the land in the hands of the assignee. Here, no doubt, it can be, that is to say, on the lands of the riparian proprietors, the Marsdens. The question is not with them, but with one who would be a wrongdoer if he had no riparian estate or occupation, and is not the less so because he has. Nor is Hill *v.* Tupper, 2 H. & C. 121, any authority against the maintenance of this action. That case decided that in respect of what was no estate, and which gave no possession, but merely a right of action, against a covenantor, that right could not be enforced against a third party. On the other hand, Whaley *v.* Laing, 3 H. & N. 675, 901, seems a strong authority in favor of the plaintiff; for all the judges seem to have considered that had the water been taken as of right the action would have been maintainable. I have only to add that to my mind, this is not a question of easement or of dominant and servient tenement. The plaintiffs rely on the possession and enjoyment as of right, and charge the defendant as a wrongdoer, not the less because he is a riparian owner. I think the plaintiffs are entitled to judgment.

Judgment for the defendants.[54]

YOCCO *v.* CONROY

1894. SUPREME COURT OF CALIFORNIA

104 *Cal.* 468, 38 *Pac.* 107

VANCLIEF, C.: Action to recover damages for alleged wrongful diversion of water by defendant from plaintiff's water pipe through which he conducted water to his land for the purpose of irrigation, and also to enjoin the defendant from diverting such water perpetually. The cause was tried by the court without a jury, and the judgment was in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment roll,

[54] Only the opinions of the judges are reprinted here.

Cf. Strong *v.* Baldwin, 154 Cal. 150, 97 Pac. 178, 129 Am. St. 149, p. 124, supra.

and contends that, upon the facts found by the court, the judgment should have been in his favor. The material substance of the facts found is as follows: In February, 1881, the defendant owned and resided upon a tract of land through which ran a living stream of water called a "gulch"; and at the same time plaintiff owned an adjoining tract of land, no part of which adjoined or included any part of the stream or gulch. On February 12, 1881, the defendant, by a grant, bargain, and sale deed, conveyed to plaintiff one square rod of land at a certain point in said gulch, through the center of which square rod said stream ran; and by the same deed granted to plaintiff a defined right of way for a water pipe of one inch diameter from said square rod of land to plaintiff's nonriparian land. After the description of the land and the right of way, the deed contains the following: "This deed is intended and does hereby grant and convey to the said party of the second part [plaintiff] the right to lay a one-inch pipe along the above-described piece of land [the way] so as to convey the running water from said gulch to and over the land of the said party of the second part perpetually and forever." In the month of February, 1881, the plaintiff laid his pipe on the granted way, and connected it with a box at a point in the stream within the boundaries of said square rod of land; and thence, until the summer of 1889, without interruption or objection, conducted water from the stream to his land, to the full capacity of the pipe, except during such times as there was not sufficient water in the stream to supply the full capacity of the pipe, when he took all the water running in the stream above the head of his pipe.

The findings of the court as to the use of the water by plaintiff, and the diversion thereof by defendant, are as follows: "(4) The plaintiff has maintained said box and pipe as aforesaid continuously ever since said 12th day of February, 1881, and has continuously conducted and used as much of the water of said gulch as flowed into said box and through said pipe, which was, during nine months of the year, the full capacity of said pipe. During the other three months of the year some water would flow into said box and through said pipe each day, when none of the water in said gulch was diverted for the use of the defendant as an upper riparian owner; but when so diverted no water would flow into said box except what came into the stream below the diversion. (5) That defendant, some time in the summer of the year 1889, without the consent of plaintiff, laid a three-fourths inch pipe from a point in said gulch one hundred feet above said box of plaintiff, and by means thereof has ever since diverted from said gulch all the water that said three-fourths inch pipe would carry, when sufficient water flowed in said gulch at that point to fill the same. Defendant has ever since maintained, and still maintains, said pipe as aforesaid, and by means thereof has ever since diverted, and still diverts, all the water of said gulch which said

three-fourths inch pipe would carry. (6) That said acts of defendant and his diversion of the waters of said gulch as aforesaid have diminished the quantity of water flowing down said gulch to said box of plaintiff, which is the natural course of said water, and in the summer and fall months, by reason of said acts of defendant, the quantity of water which has flowed and flows down said gulch to plaintiff's said box is not sufficient to fill his said one-inch pipe if allowed to flow without any obstruction or diversion. I further find that the defendant owns the land in and on both sides of said gulch, from the place where he diverts the water by means of his pipe to the place where the plaintiff's said box and pipe are located, and that the defendant has not at any time diverted any more of the water flowing in and through said gulch than was reasonably required for domestic purposes. (7) That all the water that said one-inch pipe can carry is, and has always been, necessary for the irrigation of plaintiff's said trees."

1. The principal ground upon which counsel for respondent endeavor to uphold the judgment is that defendant is riparian owner of all land over which the stream runs, except the square rod conveyed to plaintiff, and by reason thereof was entitled to divert the water as he did for domestic use, etc. The ready answer to this is that to whatever extent defendant granted to plaintiff the use of the water of the stream, to the same extent he parted with his riparian right to divert or use that water to the detriment of his grantee, Gould *v.* Stafford, 91 Cal. 155, and authorities there cited; Lux *v.* Haggin, 69 Cal. 392, and, since plaintiff claims the use of the water solely under the grant from the defendant, his alleged rights depend upon that grant alone.

2. The only other ground upon which the respondent endeavors to support the judgment is that the deed does not expressly grant the right to divert water to the full capacity of plaintiff's pipe at all times, nor to divert all the water at any time; and that, under the circumstances, it should not be so construed as to deprive defendant of the use of sufficient water for domestic purposes, etc. But the principal circumstance urged as a reason why it should not be so construed is that defendant is riparian owner, and therefore has a preferred right to the use of so much water as is necessary for household purposes and for watering cattle, etc. The effect of this circumstance has already been considered, and, besides, it is not found, and does not appear, that defendant had no other source of supply of water sufficient for all these purposes. If the deed is open to construction as to the extent of the grant, the most reliable circumstance in aid of such construction is the practical construction given it by the acts of the parties during the first eight years immediately following its execution, during which period plaintiff diverted water to the full capacity of his pipe, except while there was not sufficient water in the stream for that purpose, when he diverted all until interrupted

by defendant in the summer of 1889. See findings 4 and 5. Yet I think the diversion and use of the water by plaintiff during the first eight years was in accordance with the intention of the parties as expressed or clearly implied in the deed. It appears by the findings that the diversion of the water by the defendant was a detriment to plaintiff, for which the latter was entitled to nominal damages at least. I think the judgment should be reversed, and the cause remanded, with instructions to the trial court to render judgment on the findings in favor of plaintiff for nominal damages; and also to grant an injunction against the defendant, perpetually restraining him from diverting any water from any point in the gulch above the head of plaintiff's pipe, except the surplus thereof over what may be necessary to supply plaintiff's pipe to its full capacity.

We concur. Searls, C.; Belcher, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the court below is instructed to render judgment in favor of plaintiff for one dollar as damages, and to grant a perpetual injunction against the defendant, restraining him from diverting any water from the gulch or stream from any point therein above the head of plaintiff's pipe, except the surplus thereof over and above so much as may be necessary to supply said pipe to the full capacity thereof.

DUCKWORTH ET AL. *v.* WATSONVILLE WATER AND LIGHT CO. ET AL.

1907. SUPREME COURT OF CALIFORNIA

150 *Cal.* 520, 89 *Pac.* 338

SHAW, J.: Plaintiffs are the owners of 320 acres of land fronting on Pinto lake; the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest. They claim rights in the waters of the lake as riparian proprietors thereon, and the plaintiff S. J. Duckworth also claims a right by appropriation to take therefrom a quantity of water equal to a continuous flow of 250 miner's inches under a four-inch pressure. The lake contains an area of about seventy acres. The defendant Watsonville Water & Light Company owns sixty-five acres of the bed and surface of the lake and all the land surrounding it, except the land of plaintiffs and two other tracts of small extent, and claims the ownership of, and the right to take and use, all the waters of the lake. The purpose of the action, as stated in the complaint, is to have the plaintiffs' alleged rights determined. The corporation defendant filed a cross-complaint, alleging ownership of all the water of the lake, and asking that its right be also determined. Judgment was given declaring that the plaintiffs have the right

to take from the lake and use upon their land as much water as they could beneficially use thereon, not exceeding a continuous flow of 250 miner's inches, and enjoining the defendants from interfering with the plaintiffs' right to such use, and that the defendant corporation take nothing by its cross-complaint. The defendants appealed from the judgment within sixty days after its rendition, and present the evidence in the record by a bill of exceptions.

The plaintiffs derive their title to the land from Carmen Amesti de McKinlay, who, on May 13, 1901, leased the land to S. J. Duckworth, and on August 6, 1901, conveyed it to the plaintiff Flora McKinlay Duckworth, subject to the lease. In 1885, while Carmen Amesti de McKinlay was the owner in fee of the land, she made conveyances to the defendants Smith and Montague, whereby she granted to them "all and singular the water and riparian and water rights and privileges of every kind, character and description which belong, or in any manner pertain to," the 320 acres of land, the same being particularly described therein, reserving, however, the right to water for domestic use and watering stock thereon. On January 21, 1897, Smith and Montague conveyed to the Watsonville Water & Light Company all the waters, right, and privileges conveyed to them by Carmen Amesti de McKinlay as aforesaid. Smith and Montague thereupon, so far as appears, ceased to have any interest in the property in controversy. They joined in the answer and join also in the appeal. There are some indications in the evidence that their holding prior to 1897 was for the benefit of the water company. In any event, as they have no present interest, their position in the case need not be further discussed.

* * * * * * *

The only use which the water company makes of the water is to take it to nonriparian lands to be used thereon for irrigation. Respondents claim that the only right of the water company to the water, shown in the case, consists of the riparian rights pertaining to the narrow strip of land belonging to the water company surrounding the greater part of the lake, and the riparian rights under the McKinlay deeds, and that the use made of it is not in the exercise of either of these rights, but is inconsistent with each of them. In regard to this claim it is to be observed that, so far as the use made of the water by the water company may affect the rights claimed by the Duckworths as riparian owners of the McKinlay land, they have no ground of complaint, being estopped by the McKinlay deeds, and not having regained the rights by adverse possession. The estoppel does not extend to the water necessary for domestic use and for stock, but their right to that extent is not in dispute, nor have they been deprived of it by the water company. But S. J. Duckworth claims a right

to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinlay deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right possessed by him. But the claim that the water company has not established any other right is not maintainable. Its cross-complaint alleges that it is, and for a long time has been, "the owner and entitled to the exclusive use of all the waters" of Pinto lake. The plaintiffs, in their answer thereto, deny that the water company is, or has been, "the owner and entitled to the exclusive use of all the waters" of the lake. That is not a good traverse of the allegation. It is an admission that the water company is entitled to substantially all of the water. Fitch *v.* Bunch, 30 Cal. 208; Blood *v.* Light, 31 Cal. 115; Fish *v.* Redington, 31 Cal. 185; Reed *v.* Calderwood, 32 Cal. 109; Doll *v.* Good, 38 Cal. 287. This allegation of the cross-complaint, therefore, stands as an admitted fact of the case, except so far as it is inconsistent with the affirmative allegations of the answer thereto and of the original complaint. The effect, for the purposes of the trial, was to establish the fact that the water company owns and has the exclusive right to use, for any purpose and at any place, all of the water of the lake, excepting such portion thereof, or right thereto, as is alleged and was proved to belong to the plaintiffs or either of them. Inasmuch as the evidence did not show, and the court did not find, that the alleged claims of plaintiffs included all the waters of the lake, the judgment that the defendants take nothing is contrary to the evidence and to this admission of the pleadings. The existing rights of other riparian owners, not parties to this suit, are not material to this case.

The right to appropriate water, under the provisions of the Civil Code, is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests. And the right can not be disputed except by one who has or claims a superior right or interest, and by him only so far as there is a conflict. It can not be vicariously contested by another on behalf of the owner of the better right. The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator on the same stream; but he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not, of itself, deprive any private person of his rights. It merely vests in the appropria-

tor such rights as have not previously become vested in private ownership either by virtue of some riparian right, or because of prior statutory or common-law appropriation and use. It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in the stream, unless it has been continued adversely thereto for the period of five years, under such circumstances as to gain a title by prescription, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

It follows that the attempted appropriation by S. J. Duckworth of a part of the water of the lake did not divest or affect the existing rights of the water company either as riparian owners, or by virtue of a prior appropriation or use. And so far as his claim was adverse to, and in conflict with, the prior rights and interests of the water company, it was entitled to a decree quieting its title against him and enjoining him from asserting such adverse title. This applies to the riparian right which attached to its strip of land partially surrounding the lake, as well as to any other prior right which it possessed to the water. The fact that the company had not used the water on this narrow strip did not affect the riparian right. A riparian right is neither gained by use, nor lost by disuse, and, for the protection of these riparian rights, the water company is entitled to a judgment declaring Duckworth's appropriation subject to the riparian rights pertaining to its lands and subject to all other prior rights of the water company, so that the continued use of the water by Duckworth shall not be adverse, and shall not ripen into an easement, which, in effect, would divest the rights of the water company.

* * * * * * *

In conclusion, we deem it proper to say that, upon another trial, if the court shall decide that either of the parties possess rights to the water, acquired by appropriation under the statute, or by diversion and use, it will be necessary to ascertain and declare the amount of water covered by the right owned by each respectively. It is not necessary to mention the other points discussed in the briefs.

The judgment is reversed, and a new trial ordered.[55]

We concur: Angellotti, J.; Sloss, J.; McFarland, J.; Henshaw, J.; Lorigan, J.

[55] See also another part of this case reported, p. 95, supra; Lawrie *v.* Silsby, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. 927; Higgins *v.* Flemington Water Co., 36 N. J. Eq. 538; Doremus v. Paterson, 63 N. J. Eq. 605, 52 Atl. 1107; 65 N. J. Eq. 711, 55 Atl. 304; Arroyo Ditch, &c., Co. *v.* Baldwin, 155 Cal. 280, 100 Pac. 874; Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 432, 17 Pac. 535, 7 Am. St. 183.

GILLIS *v.* CHASE ET AL.

1892. SUPREME COURT OF NEW HAMPSHIRE

67 N. H. 161, 31 Atl. 18, 68 Am. St. 645

Case reserved from Hillsborough county.

Five actions by John F. Gillis, administrator of John Gillis, against William F. Chase and others, for diverting water, and diminishing the flow on plaintiff's land.

Facts found by the court: The plaintiff and one J. S. Winn are riparian owners. Winn's land is above the plaintiff's upon the stream. About fifteen years ago Winn built a dam to hold back the water, and formed a reservoir, from which, by an aqueduct, he supplied water to his farm buildings. He also permitted the defendants, who are not riparian owners, to connect aqueducts with the reservoir, and thereby supply their buildings with water, conveying to same by deed a right to such use. The defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected. The use of the water made by the several defendants is reasonable as to the quantity used. Should all the defendants cease using the water, the amount flowing by the plaintiff's land would not be perceptibly increased. Judgment for defendants.

BLODGETT, J.: The case finds that "the defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected." In virtue of the ownership, Winn's right to divert the water for use to a reasonable extent was incident to the land, and, as the plaintiff has failed to show any actual damage, it is only for an unreasonable and unauthorized diversion that the law will imply damage to him, because, each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor, whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact. Jones *v.* Aqueduct Co., 62 N. H. 488, 490; Rindge *v.* Sargent, 64 N. H. 294, 295. This question having been found adversely to the plaintiff by the trial court, the finding is conclusive against him (Jones *v.* Aqueduct Co., supra), and consequently the only question now

open to him is as to the right of Winn, in his character as a riparian proprietor, to sell the nonriparian defendants any of the water belonging to him as incident to his land. The English rule is understood to be that "a riparian owner can not, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream; and any used by a nonriparian proprietor, even under a grant from a riparian owner, is unlawful." Ormerod *v.* Mill Co., 11 Q. B. Div. 155; Swindon Water-works Co. *v.* Wilts & Berks Canal Nav. Co., L. R. 7, H. L. 697; Nuttall *v.* Bracewell, L. R. 2 Exch. 1. But this rule is otherwise in this jurisdiction, for it is held here to be a question of fact whether the use of the water made by a riparian owner for his own purposes or for sale to others, is, under all the circumstances, a reasonable use. Jones *v.* Aqueduct and Rindge *v.* Sargent, supra. And in view of the finding that the sale of the water to the defendants by Winn is a reasonable use of his right as a riparian owner, the plaintiff has no standing on this branch of the case. Judgment for the defendants.

Clark, J., did not sit. The others concurred.

HOLKER *v.* PORRITT

1875. IN THE EXCHEQUER CHAMBER

L. R. 10 *Exch.* 59

Appeal from the judgment of the court of exchequer discharging a rule obtained by the defendant to enter the verdict for him. Reported Law Rep. 8 Exch. 107.

The facts of the case were as follows: From time immemorial two streams flowing down to a deep open valley called Buckden Ginnell, there joined, and the united stream was carried along an artificial embankment across Buckden Ginnell into the Broadwood Edge estate, and flowed to a point in Broadwood Edge farm, marked E on the plan used at the trial. There it was divided by a stone or feather, which had existed as far back as any of the witnesses remembered, and as to the origin of which there was no evidence. Part of the divided stream flowed down into Buckden brook, and thence into the River Irwell; the other part flowed to a watering trough in Silas Wilson's farm, which formed part of the Lumn Hall estate. The water which flowed to the watering trough was formerly used for cattle and for domestic purposes, and the residue overflowed the trough, became diffused over the surface, and discharged itself by percolation through the soil.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge to the River Irwell, and

which was copyhold of the manor of Tottington, in the Salford division of the county of Lancaster. The estate comprised a cotton mill, situated on the banks of the Irwell, about half a mile distant from Silas Wilson's farm; this mill Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he constructed lodges or reservoirs adjacent to the mill, which, in 1846 and 1847, he connected with the watering trough on Silas Wilson's farm.

In 1865 Walker purchased the Broadwood Edge estate, which was also copyhold of Tottington Manor.

In 1867 he conveyed to the plaintiff the paper mill, with the lodges and reservoirs, and with power to enter on the Lumn Hall and Broadwood Edge estates to repair and construct weirs and goits, and also the full and free use and enjoyment of all springs, wells and streams of water in, under, upon or arising or issuing in or from any part of the Lumn Hall and Broadwood Edge estates. The land so conveyed was, at the nearest point, 400 yards distant from Silas Wilson's farm.

The defendants were owners of land traversed by the two streams which united in Buckden Ginnell, and the action was brought to recover damages for an obstruction by them of these two streams.

At the trial of the cause before Willes, J., at the Manchester Summer Assizes, 1872, an obstruction was admitted, and a verdict was entered for the plaintiff by consent, with 40s. damages, with leave to the defendants to move to enter a nonsuit or a verdict for them, if the plaintiff was not entitled to maintain this action.

A rule having been obtained and afterwards discharged, Law Rep. 8 Exch. 107, the defendants appealed.

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The judgment of the court (Lord Coleridge, C. J.; Keating, Lush, Quain and Archibald, JJ.), was delivered by

LUSH, J.: Upon the hearing of this appeal before us at the sittings after the last term, two questions were principally argued, first whether the conveyance of the surplus water by means of the drain from the watering trough to the mill is to be considered as a prolongation of the stream entitling the mill-owner to the ordinary riparian rights thereon; and, secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker and afterwards by the plaintiff, the latter had acquired a right to the water as an easement by virtue of the Prescription Act.

Upon consideration of the peculiar facts of this case, we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act. It must be taken, upon the facts stated, that the owner of Silas Wilson's farm had a prescriptive right to the maintenance of the stone or feather at the point E, and of the diversion by means of it of part of the stream to and for the exclusive use of the farm. The water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him

in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners. In collecting the overflow at the trough and conveying it to the mill, he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrong-doer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability. It is established by many authorities, which are collected in and confirmed by Mason *v.* Hill, 5 B. and Ad. 1, that as soon as the owner of land on a stream has appropriated the water to a beneficial use he may sue for the injury done to him in respect of such new use. In that case the proprietor having appropriated the stream to the use of a mill newly erected, was held entitled to recover from a proprietor higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrong-doer would only have been liable to nominal damages.

If, therefore, Walker had been in possession of the mill in question, it is clear to us that he could have brought this action, not because he happened to be at the same time riparian owner higher up than the mill and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is surrenderee of the mill with all the water rights annexed, and which had become appurtenant to it. Walker had chosen to create a servitude on his own land, but none has been created, or been attempted to be created, on the lands or riparian rights of the defendants.

None of the authorities cited conflict in the least degree with this view. In the case of Stockport Water-works Co. *v.* Potter, 3 H. & C. 300, the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest; and it is clear that such use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not; whether the grounds upon which the majority decided can be maintained, or whether it is distinguishable from Nuttall *v.* Bracewell, Law Rep. 2 Exch. 1, we need not now consider. The present case

stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding, for the reasons we have given, that the judgment of the court below ought to be affirmed.

Judgment affirmed.

IRWIN *v.* PHILLIPS ET AL.

1855. SUPREME COURT OF CALIFORNIA

5 *Cal.* 140, 63 *Am. Dec.* 113

HEYDENFELDT, J., delivered the opinion of the court. Murray, C. J., concurred.

The several assignments of error will not be separately considered, because the whole merits of the case depend really on a single question, and upon that question the case must be decided. The proposition to be settled is whether the owner of a canal in the mineral region of this state, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream, for the purpose of mining. It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship; and that the miners have the right to dig for gold on the public lands was settled by this court in the case of Hicks et al. *v.* Bell et al., 3 Cal. 219.

It is insisted by the appellants that in this case the common law doctrine must be invoked, which prescribes that a water course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being both at the civil and common law that the owner of lands on the banks of a water-course owns to the middle of the stream, and has the right in virtue of his proprietorship to the use of the water in its pure and natural condition. In this case the lands are the property either of the state or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of water-courses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to

mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had been already turned, for the purpose of supplying the mines at another point.

Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this state the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the state governments, and with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act "canals and water races" are declared to be property subject to taxation, and this when there was none other in the state than such as were devoted to the use of mining. Section 2 of Article IX of the same act, providing for the assessment of the property of companies and associations, among others mentions "dam or dams, canal or canals, or other works for mining purposes." This simply goes to prove what is the purpose of the argument, that however much the policy of the state, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *qui prior est in tempore, potior est in jure.* The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream, the wa-

ters of which have not been taken from their bed, they can not be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

It follows from this opinion that the judgment of the court below was substantially correct, upon the merits of the case presented by the evidence, and it is therefore affirmed. See Stoakes *v.* Barrett & Co., Ante. 36 and note.

CRANDALL ET AL. *v.* WOODS ET AL.

1857. SUPREME COURT OF CALIFORNIA

8 *Cal.* 136

This was an action for damages and a perpetual injunction on the part of the Union Water Company against Woods and wife, and Andrew Jamieson, for the diversion of water claimed by plaintiff. The defendants Woods disclaimed, while the defendant Jamieson justified his right to the water. The facts were as follows: In the year 1850, the defendants Woods were in the possession of a tract of government land that contained several springs of running water, which, after running a short distance through their natural outlets, united and formed one stream, which, in the year 1851, ran through a small tract of land adjoining, and was used by the owners thereof for irrigation, and other natural purposes. In June, 1854, Woods sold out his right to the springs to the plaintiffs, and became a member of said company, who at once constructed a system of water-works whereby the town of Grass Valley has been supplied by water ever since the year 1852. The defendant Jamieson connected himself by various conveyances with the title that the possessors in 1851 had to the ranch adjoining the Woods tract, and claimed and exercised the right in 1856 of using the water of plaintiffs for his natural uses. The case was tried before a jury, whom the defendant Jamieson asked the court to instruct as follows, which being refused, an exception was duly taken: "If the jury believe, from the evidence, that the defendant, Andrew Jamieson, or those under whom he holds, located the ranch or piece or parcel of ground prior to the claim set up by the plaintiffs to the waters of the springs in question, and that the water of said springs, by its natural flow, found its way into defendant Jamieson's said ranch, then that said Jamieson was entitled to the reasonable use of said water, and to have the same flow through his ranch for

agricultural and farming purposes, as against the plaintiffs, subsequently diverting the same for culinary and domestic purposes." The jury returned a verdict in favor of plaintiffs on which judgment was rendered. Defendants appealed.

* * * * * * *

MURRAY, C. J., delivered the opinion of the court—Burnett, J., concurring.

The only question involved in this case is, whether a party who locates upon and appropriates public lands belonging to the United States, is entitled to the use of streams and water-courses naturally flowing through such lands, as against persons subsequently appropriating and using the waters of said streams. By the common law, the proprietor of lands upon the banks of a water-course owns to the middle of the stream, and the proprietor of the lands through which the stream flows is held to be the owner of the bed of the stream, and entitled to the use of the water which flows over his land.

The property in the water, by reason of riparian ownership, is in the nature of a usufruct, and consists in general not so much in the fluid as in the advantage of its impetus. This, however, must depend in a great measure upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels, and should be permitted thus to flow, so that all through whose lands it passes may enjoy the privilege of using it. A riparian proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors.

The uses to which water may be appropriated are: 1st, To supply natural wants, such as to quench thirst, to water cattle, for household or culinary purposes, and, in some countries, for the purposes of irrigation. These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which are not indispensable to man's existence. Water is regarded as an incident to the soil, the use of which passes with the ownership thereof. As a general rule, a property in water can not be acquired by appropriation, but only by grant or prescription.

Having thus stated the fundamental principles upon which this right is founded, it is evident that the only difficulty in this case arises, first, from the fact that the defendant is not the owner in fee of the land, but that the title to it is in the government of the United States; and second, the necessity of laying down some rule consistent with our former decisions, and the policy of the state, which has been to protect mining interests and improvements as far as possible.

In Irwin *v.* Phillips, which is the leading case upon the subject of the appropriation of water, it was admitted that the lands

upon which the mining-claims were situated, and through which the water-ditch was located, were government lands, and that the mining-claims were located after the water had been appropriated.

* * * * * * *

Since this decision, a special property has been recognized in water, not in the sense in which the word property is ordinarily used; but the courts have held, that a right to water as a usufruct, may be acquired by appropriation, as against a subsequent appropriator, who shows no title to the soil; and that by the appropriation of water, and the construction of a canal, the party acquires an easement or franchise, which he may enjoy and protect. If this is an innovation upon the old rules of law upon this subject, it is such a one as the peculiar circumstances of the country, and the immense importance of our mining interest will justify.

* * * * * * *

If the rule laid down in Irwin *v.* Phillips, 5 Cal. 146, is correct as to the location of mining-claims and water-ditches, for mining purposes, and priority is to determine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. The simple question was, that as between persons appropriating the same land, or land and water both, as the case might be, that the subsequent appropriator takes, subject to the rights of the former.

But an appropriation of land carries with it the water on the land, or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with water. If the owners of the mining-claim, in the case of Irwin *v.* Phillips, had first located along the bed of the stream, they would have been entitled, as riparian proprietors, to the free and uninterrupted use of the water, without any other or direct act of appropriation of the water, as contra-distinguished from the soil. If such is the case, why would not the defendant, who has appropriated land over which a natural stream flowed, be held to have appropriated the water of such stream, as an incident to the soil, as against those who subsequently attempt to divert it from its natural channels for their own purposes.

One who locates upon public lands with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and that the fact is established that he acquired his rights subsequent to those of others, then, as both rest alike for their foundation upon appropriation, the subsequent locator must

take subject to the rights of the former, and the rule, *qui prior est in tempore, potior est in jure,* must apply.

Let us examine the effect of such a rule for a moment, and see if the consequences which the respondent predicts, viz.: the destruction of the use and value of ditch property in the mines, will necessarily flow from it. A has located mining-claims along the bed of a stream, before any water-ditch or flume has been constructed; will any one doubt that he should have the free use of the water, as against subsequent locators of either mining-claims or canals? Or, suppose he had located a farm, and the water passing through his land was necessary for the purposes of irrigation, is not this purpose just as legitimate as using the water for mining? It may or may not be equally as profitable, but irrigation for agricultural purposes is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial want, or a mere stimulant to trade and commerce.

It is understood, that the location of land carries with it all the incidents belonging to the soil. Those who construct water-ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators.

In the case before us, the plaintiffs are not the proprietors of a ditch constructed for mining purposes, (although we have endeavored to show that this would make no difference). They claim that they purchased the privilege of the water from one Woods, and conducted the same by means of pipes, etc., to the town of Grass Valley, for the use of the inhabitants. The water in dispute had its source in natural springs rising upon the ranch or farm of Woods, who located the land in 1850. In 1851, the ranch of the defendant which was contiguous to that of Woods, was located, and the water flowed by natural channels upon it. Woods sold the privilege of diverting the water to the Union Water Co., in 1852. At the time of this sale the rights of the defendants had accrued. Woods had no power of disposition over the water; he could use it for the purpose of supplying the wants of himself and his stock; and if there was sufficient, might, without interfering with the rights of those below him, have used a portion for the purposes of irrigation; but he had no right to divert it from its natural channel, or prevent it from flowing upon the lands of the defendants. Evans *v.* Merriweather, 4 Ill. 492; and Arnold *v.* Foot, 12 Wend, 330.

It does not appear, from the evidence in this case, that the water would have flowed through the town of Grass Valley, or that it was the only water which could be obtained for the purpose of supplying the town; neither does it appear that the amount used by defendant for irrigation was so large as to materially diminish the

quantity, or render the supply inadequate to the wants of the inhabitants of the town.

The plaintiffs declare as a company, and count upon their appropriation, and not upon their rights as riparian proprietors. This relieves the case of the question, whether, granting the defendant had a right to use the water to supply his natural wants, he could use it for the purpose of irrigating his land.

It is urged by the respondent that they have acquired a right to the use of the stream in question by adverse enjoyment or prescription. To acquire a title in this manner, it is necessary that the enjoyment or prescription should have continued for a period corresponding to the time fixed by the Statutes of Limitations as a bar to an entry on land. The period fixed by our statute is five years; the plaintiff's possession has continued but four, so that his right has not yet become complete.

Judgment reversed, and cause remanded.

Revised Statutes of the United States

Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Act July 26, 1866, ch. 262, sec. 9, 14 Stat. 253.

Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

Act July 9, 1870, ch. 235, sec. 17, 16 Stat. 218.

VANSICKLE *v.* HAINES ET AL.

1872. SUPREME COURT OF NEVADA

7 Nev. 249

It appears that in 1857, the plaintiff Vansickle diverted, by a ditch for irrigating and domestic purposes, one-fourth of the water of Daggett creek, a small tributary of the Carson river in Douglas county. He made the diversion at a point then on the public land, but which in 1864 was patented by the United States to the defendant Haines. In 1865, Vansickle obtained a patent for his own land where he used the water. In the fall of 1867, Haines and his co-defendants, William F. Leet and Charles Vangordor, constructed a wood flume on Haines' land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. In November, 1870, plaintiff commenced this action, asking for $1,500 damages and an injunction to restrain further diversion of that portion of Daggett creek claimed to have been appropriated by him. There was a decree for plaintiff substantially as prayed for, from which defendants took this appeal.

* * * * * * *

By the court, Whitman, J.:

Respondent claims damages against appellants for past diversion of the waters of Daggett creek, and prays an injunction against further continuance of the injury alleged. The district court found for respondent; hence this appeal. Many questions are argued in the briefs of respective counsel, which it is believed are not pertinent to the controlling question involved.

The district court finds that the water-course in question, a small non-navigable stream, nowhere in its natural channel runs over the land of respondent; but does so run through the land of appellant Haines. It is also found that the respondent and Haines are the owners in fee of their respective lands, by patents from the government of the United States, that of Haines bearing date December 28, 1864; that at such date, and long prior thereto, respondent had appropriated and diverted from the natural channel of the creek, for his necessary purposes, a portion of its waters, which appropriation was interfered with by appellants in December, 1867; and that since that time they have used all or nearly all of the waters of the creek, in a flume constructed and worked by them jointly for running wood. The court concludes that respondent acquired such a right by his appropriation, as should be protected in equity.

He acquired no right against Haines prior to the date of the latter's patent which could affect that grant, because there was no title in Haines to be affected by acts of the respondent. He could acquire no right against the United States, for as to that govern-

ment he was a trespasser, in that he diverted water from its land not sought to be pre-empted by him. No presumption of grant arises against the sovereign, and no statute of limitation runs, save in some excepted instances, of which this is not one.

The government of the United States then had, at the date of its patent to Haines, the unincumbered fee of the soil, its incidents and appurtenances; that was passed to Haines, there being no reservation in his patent, and none is suggested. He became the owner of the soil, and as incident thereto had the right to the benefit to be derived from the flow of the water therethrough; and no one could lawfully divert it against his consent. What use he made of it, so that such use did not interfere with the adjoining riparian proprietors, was for him to elect. He had precisely the same right to use it for his flume as for his household, his cattle, or his land.

In this case, it is urged that such use is beyond riparian rights. In a recent case in New York, an objection precisely contrary was made, and the reply of the court is a complete answer to either and both: "It is insisted by the defendant that equity ought not to interfere in behalf of the plaintiffs, for the reason that they do not want the water-power afforded by the stream for use. This is a mere assumption. * * * But if the facts claimed were clearly established, it would not protect the defendant in wrongfully withholding the stream. No man is justified in withholding property from the owner, when required to surrender it, on the ground that he does need its use. The plaintiffs may do what they will with their own." Corning *v.* Troy Iron and Nail Factory, 40 N. Y. 206. From the facts found, it follows that appellant Haines, owner of the soil, has the right to the flow of the water of Daggett creek in its natural channel; what use he may make of it when there is beside the question, so far as respondent is concerned. The right of Haines protects his coappellants. The decree of the district court is reversed, and the cause remanded, with instruction to enter a decree for appellants.

ISAACS *v.* BARBER

1894. SUPREME COURT OF WASHINGTON

10 *Wash.* 124, 38 *Pac.* 871, 30 *L. R. A.* 665, 45 *Am. St.* 772

HOYT, J.: This action was brought by respondent to restrain the defendant from interfering with a dam which had been erected for the purpose of diverting water from Mill creek into a race or flume which led to his flouring mill. Defendant justified his action under a claim of the right to have the waters flow past his place, situated on said creek, between the point where the water

was diverted and respondent's mill. Respondent claimed the right to divert the water, and founded such claim upon several distinct grounds. The cause was tried before a referee, who reported the testimony, with his findings of fact and law. Such findings were set aside by the Superior Court, and new ones made as the foundation for the decree which was entered. Defendant, not being satisfied with such decree, prosecutes this appeal, and asks for a reversal, for the reason that the findings of fact were not warranted by the proofs, and also because the facts found did not warrant the conclusions of law founded thereon. We have carefully examined all the proofs, and although, upon some points, they are not as full as they should have been, we are not satisfied that they were insufficient to warrant every finding of fact made by the lower court. It follows that such findings must stand, and that, in the light thereof, the rights of the parties must be here determined.

It appears from such findings that the waters of Mill creek were, in the year 1861, diverted by plaintiff into his mill race, and conducted to his mill, for use as a propelling power, to substantially the same extent as they are now diverted, conducted, and used. It, however, appears therefrom that there had been a slight increase in the amount of water diverted at certain seasons of the year, and upon the fact of such increase that portion of the decree in favor of the appellant is largely based. We are not satisfied that the fact of such increase was established by the proofs, but, the plaintiff not having appealed, we are not called upon to investigate as to that portion of the decree adverse to him. It further appears from the findings that, at the time the water was so diverted by the plaintiff, all of the land, on both sides of the creek, from the place of its diversion to a point below the land now owned by the defendant, was a part of the public domain, and that it so remained until 1863, at which time the tract of which defendant's land is a portion was entered and purchased at private cash sale by one Artemus Dodge, who, in 1865, received a patent therefor. It further appears that said Dodge, prior to such entry, gave the plaintiff oral permission to conduct the water across the tract of land, and that George J. Dodge, to whom he deeded it, executed to plaintiff a written instrument, in the shape of a lease, formally conferring the right to so conduct the water by means of the race and flume as then constructed for the period of ninety-nine years; that the operation of the mill, and the source of its power, and the means by which it was diverted from and conducted to the mill, were open and notorious, and known to every one in the vicinity, including said Artemus Dodge and those holding under him, including the defendant; and that no complaint was ever made in reference thereto until the year 1885. Upon these material facts, among others, found by the court, respondent

contends that, as between himself and the defendant, he is entitled to the use of the water for the purpose of propelling his mill to the extent to which he had used it from the time of its original diversion. He makes this contention for the reasons: First, that he is the owner of the water for the purpose of running his mill by reason of his prior appropriation thereof; second, that the grantors of the land, by the giving of the permission to construct the flume, and the making of the lease, as above stated, and by standing by and seeing money expended by virtue of such permission and lease, estopped themselves, and those holding under them, from interfering with such flume, or the diversion of the water to effect which it was constructed; and, third, that there had been such open, continuous and adverse user as to give title by prescription. The first claim is met by the appellant by two principal propositions: One, that it was not shown that any right to prior appropriation existed as a part of the law or local customs of the locality; the other, that if the court could take judicial notice of the existence of such customs, or so find from the facts proved, they had no force as against the defendant, for the reason that the grantor through whom he claims by mesne conveyance acquired title to the land by grant from the government prior to the passage of the Act of Congress of July 26, 1866.

If the first proposition is determined adversely to appellant, he substantially concedes that the plaintiff would have been entitled to the use of the water appropriated in 1861 if the grant of the land of which his was a part had not been made by the government until after the passage of said act. Each of these propositions raises questions of the utmost importance, and we have given them such careful consideration as our opportunities would allow, and have come to the conclusion that this state, or at least that portion of it east of the Cascade mountains, was included within the territory where the right to prior appropriation of water for mining and other beneficial purposes was recognized by the courts and the lawmaking power, and that such right was established by a custom so universal that courts must take judicial notice thereof. We therefore hold that the right to prior appropriation, as recognized by said act of congress, existed as a part of the laws and customs of the locality. Such holding compels a consideration of the second proposition above suggested.

It is argued by appellant that, by absolute grant of the land before the passage of said act of congress, the title passed with such riparian rights as were recognized by the common law of England, and that such rights, having become vested before its passage, could not be affected thereby. If the right to appropriate water from streams upon the public domain is derived from the passage of the act in question, and if, before that time, such acts of appropriation were, as against the government of the United States, trespasses upon the public domain, it is clear that

this contention must be sustained. But, in our opinion, such was not the fact. The United States, as the owner of nearly all the lands in the locality where such use of the water was required, had the power to establish such rights in relation to its appropriation and use as it saw fit; and to the extent that it recognized such rights the common law in relation thereto was modified or abrogated. That this could be done by direct act of congress is not disputed by appellant, and we think it could also be done by such action on the part of the government as clearly disclosed its intention, though not evidenced by act of congress, and that such modification or abrogation would have force as against the grant of the government, though not expressly embodied in the instrument or legislation by which the grant was made. If the action of the government was of such a nature as to evidence its intent to inaugurate such a modified system as to rights to waters upon the public domain, it was of such a nature as to convey notice to all persons interested of that fact. If from such action such intent could be presumed, it must be because it had substantially the same effect as direct legislation by congress; and, since every one must take notice of such legislation, they must likewise take notice of a practice having the force thereof.

The material question, therefore, is as to whether or not, prior to the act of 1866, the practice in the locality referred to of appropriating the waters of running streams by means of their diversion for mining and other beneficial uses had been so sanctioned by the practice of the government that it had become lawful. It is not necessary for us to enter into any extended discussion as to this question, nor to enlarge upon the situation of the localities in which the custom of so diverting waters prevailed, nor to speak of the absolute necessity of such customs, for the reason that the Supreme Court of the United States has ably discussed and fully decided the question. And such question is a Federal one, upon which such decision is controlling in the courts of the states, as well as in those of the United States. A reference to a few cases will establish the above-stated conclusions as to the position of said Supreme Court upon this question. In Atchison *v.* Peterson, 20 Wall. 507, Mr. Justice Field, speaking for the court, made use of the following language: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands, for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common

law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only to a very limited extent, to the necessities of miners, and inadequate to their protection. * * * This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866." And in Basey *v.* Gallagher, 20 Wall. 670, the court, speaking by the same learned jurist, referring to the case of Atchison *v.* Peterson, supra, stated that, among other things, it was held in that case "that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection." And further on in the same case, after having reviewed several other decisions of the Supreme Court, and speaking of the act of congress in question, the following language was used: "It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition." And in Forbes *v.* Gracey, 94 U. S. 762, and in Jennison *v.* Kirk, 98 U. S. 453, the doctrine that said act did not create the rights therein referred to, but was simply in affirmation thereof, is distinctly recognized. And in Broder *v.* Water Co., 101 U. S. 274, the court, speaking by that distinguished judge, Mr. Justice Miller, seems to have put this question fully to rest. He made use of the following pertinent language: "It is the established doctrine of this court that rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds upon which this construction rests are so well set forth in the following cases, that they will be relied on without further argument." Then follows a citation of the cases to which we have referred. This language and that of the other cases would seem to make it unnecessary that anything further should be said to show that, in the opinion of said Supreme Court, the government had, by its acquiescence or consent, so recognized acts of this nature on the public domain as to make them lawful, and a basis of right which the government and its grantees must respect. It is true, as suggested by the Supreme Court of California, in Lux *v.* Haggin, 69 Cal. 255, that the exact question involved in

the case at bar was not involved in any of the cases above cited; but the positive language used therein, and the emphasis of the proposition that the right was not created by the act of 1866, but simply recognized and continued, is sufficient to clearly show that such rights would have been protected as well before the passage of that act as after. If it was a right which it was worth while for the court to talk about, it was a vested right; and if a vested right and of such a nature that every one must take notice thereof, it would not be taken away by any grant made thereafter, for the reason that the courts would construe such grant as though the right had been in express terms excepted from its force.

It has been held by all of the courts that have considered this question that, after the passage of said act, all grants must be construed in connection with the rights therein provided for, and such rights protected as above stated. There is no provision in the act for the protection of the rights therein recognized; and, if they existed before as well as after its passage, they were excepted from grants made after their inception before such passage the same as after. It is only because of their existence as rights of which every one must take notice that they are held to modify grants thereafter made. And, if rights under the statute thus modify grants, rights of the same nature established by acquiescence should also be held to modify such grants made after their acquisition. There are decisions by the courts of some of the states which directly sustain the contention of the appellant, and go to the full extent of holding that, where the grant took effect before the passage of the act in question, the rights acquired by the custom of the locality were lost, unless expressly reserved by the terms of the grant. The principal case of this kind is that of Vansickle *v.* Haines, 7 Nev. 249, in which it was directly held as above stated, after careful consideration; and nearly or quite all the other cases upon the subject refer to this one, and found their decision largely upon its authority. It follows that, when this case was overruled by the court in which it was decided, the authority of all of the cases upon that side of the question was greatly lessened. In the case of Jones *v.* Adams, 19 Nev. 78, in which the case above referred to was overruled, the court carefully reviews the whole question, and founds its holding to the effect that the rights should be given effect against grants before the date of the act of 1866 as well as after, not only upon a well-considered course of reasoning, but also upon the fact that such was their understanding of the inevitable conclusion to be drawn from the language of the Supreme Court of the United States in the cases hereinbefore cited. Some of these decisions were founded upon the conditions which existed in a mining country, and related to the acquisition of mining interests, and the necessary water for the prosecution of the mining business, but enough appears to show that the same rule would apply as to the diversion of water for any

other necessary and beneficial use. It does not follow, as has been well observed by Mr. Pomeroy, in his treatise on Riparian Rights, that the common law of England as to riparian rights has been abrogated in the localities affected by the cases above referred to, but only that it has been so far modified as to give the rights acquired by virtue of the customs of the country force.

The United States, as owner of all of the domain, including the waters in its running streams, could by its legislation as applied thereto, or such acquiescence and practice as should be given the force of legislation, change the rule of the common law so far as it thought necessary; but it would not follow therefrom that, if no rights had been acquired by virtue of the modification of the common-law rule until after the land had passed from the government, the common-law rule would be at all effected thereby. On the contrary, so soon as the government had parted with its title, its right to change the rule in reference to the rights and incidents growing out of the ownership of the land would be entirely determined, and its grantee would take his title burdened with all rights conferred by such action or consent on the part of the government. The government, while the owner of the land, allowed the streams to be changed by the diversion of a portion of their waters. This had the effect of modifying the right to have the water flow in its natural channel, except as to the portion not diverted at the time the title passed from the government, and it was only upon this portion that the common-law rule could apply. The government had changed the streams, as it had the right to do by virtue of its ownership of all the land through which they flowed, and, while they were so changed, conveyed the land. It must follow that its grantees took title subject to the changed condition of the streams and to the rights growing out of such change. In the case at bar the right to the use of the water had been fully acquired while the land now owned by the defendant was held by the government, and its grant of the same thereafter was subject to such right. It follows that plaintiff is entitled, as against the defendant, to have such right protected by the courts.

The conclusion to which we have come as to this question makes it unnecessary for us to discuss the other grounds upon which plaintiff seeks to found his right to divert the water. Some criticism is made as to the form of the decree, but we think it sufficient to substantially protect the rights of both parties to the action. There is not as exact a measurement of the water to which the plaintiff is entitled as there might have been, but the substance of the decree in that regard is to establish and protect him in the use of the water necessary to run his mill as at present constructed, and for that reason we think it sufficient. The decree of the superior court will be in all things affirmed. The respondent will recover his costs on appeal.

Dunbar, C. J., and Scott, J., concur. Anders, J., not sitting, by reason of disqualification.

Stiles, J. (concurring). It will be found upon examination that all of the cases cited to sustain the doctrine of appropriation, upon which the foregoing decision is based, were either mining or irrigation cases, such as arose out of the necessities of the surroundings. Mines could not be worked or lands cultivated in the arid regions without diverting the waters of the streams; and, as the government's interest was that such enterprises be fostered while large areas of the public lands were still unsurveyed and not disposed of, the right to make permanent diversion of water was conceded prior to the act of 1866, as is held by the Federal Supreme Court. But this was the case of an ordinary flour mill, such as has been erected in every country over which the common law of England prevails. Every portion of the United States contains them, whether the country surrounding them be arid or not. West of the Cascade mountains they are as necessary and as frequent as they are east of them, and there is no greater reason for conceding to them this right of permanent appropriation in one locality than in another. *"Cessat ratio, cessat lex."* The peculiar circumstances demanding the concession made by the government not having existed for the support of this case of diversion, I hold that for it the concession can not be admitted to have been made, and that the common-law rule should prevail. But in the case under consideration a sufficient reason existed for the judgment rendered in favor of the respondent, for the tract of land owned by appellant, at a point lower down on the stream than respondent's dam, is a part of the tract conveyed by the government to respondent's grantor; and, when appellant received his conveyance, the common grantor had for more than twenty years acquiesced in the appropriation made by respondent at a point upon his land. I therefore concur in the result.[56]

KENDALL ET UX. *v.* JOYCE ET AL.

1908. SUPREME COURT OF WASHINGTON

48 Wash. 489, 93 Pac. 1091

RUDKIN, J.: This was a controversy between two land owners over the right to use the waters of Johnson creek, a small stream flowing into the Okanogan river, in Okanogan county, for irrigation purposes. The rights of the respective parties are predicated

[56] See Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Duckworth *v.* Watsonville Water, &c., Co. (Cal.), 150 Pac. 58; Crawford Co. *v.* Hathaway, 67 Nebr. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. 647.

upon the following facts: In the year 1895 the plaintiff John Kendall, a citizen of the United States above the age of twenty-one years, settled upon lots 3, 4, and 5, and the S. W. ¼ of the S. E. ¼ of section 25, and lot 1 and the N. W. ¼ of the N. E. ¼ of section 36, township 35 N., range 26 E. W. M., under the homestead laws of the United States. The lands embraced within the settlement were at that time unsurveyed public lands of the United States. Kendall continued to occupy and cultivate his claim from date of settlement until September 11, 1903, at which time he received a homestead patent therefor. Commencing with the year 1895 he diverted the waters of Johnson creek for the purpose of irrigating his orchard and meadow lands and for stock and domestic purposes. He increased the amount of his cultivated land from year to year until 1905, when he had fifty-five or sixty acres under irrigation and cultivation. The testimony showed that he proceeded in good faith and with reasonable diligence in bringing his land under cultivation and in applying the waters diverted to beneficial uses. In the year 1887 one Philip Perkins settled upon lands now owned by the defendants. On the 9th day of October of that year Perkins filed a notice of claim of water right with the county auditor of Okanogan county, claiming 500 inches of water from Johnson creek at a certain point, and an additional 500 inches at a certain other point. He continued to occupy the claim until about the year 1889, when he was succeeded by one Warren Perkins. The latter occupied the claim until 1897, when he was succeeded by William Maretta, and Maretta in turn was succeeded by the defendant Joyce in the year 1899. Joyce has since derived title to the original Perkins claim in part under the homestead law and in part by scripping. Prior to the year 1897 not to exceed five or six acres of the Joyce lands were irrigated or cultivated. Under these facts the court below awarded to the defendants a prior right to use the waters of the creek to the extent of seven miner's inches, measured under a four-inch pressure, to the plaintiffs one-third of one cubic foot per second of time, subject to the prior right of the defendants to the seven miner's inches, and enjoined the defendants from diverting the waters of the creek to the injury of the plaintiffs. From this judgment the defendants have appealed.

Under the facts stated, the respondents having diverted the waters of the creek in 1895 and applied the same to beneficial uses with reasonable diligence, their rights relate back to the date of their original appropriation. Offield *v.* Ish, 21 Wash. 277; Longmire *v.* Smith, 26 Wash. 439, 58 L. R. A. 308. It is equally apparent that Perkins acquired no rights by filing the notice of claim of water right in 1887. There was then no law authorizing such a notice. The notice was too indefinite to subserve any purpose, and the notice was not followed by a diversion of the water and its application to beneficial uses within a reasonable time. If, therefore,

the rights of the parties depend upon the law of prior appropriation, it is manifest that the rights of the respondent are superior to those of the appellants, except as to the quantity of water awarded to the latter by the court below.

* * * * * * *

The appellants further contend that they acquired certain rights under section 2 of the act of March 4, 1890 (Laws 1889-90, p. 706), as successors in interest of Warren Perkins, who was occupying the land at the date of the passage of that act. The section referred to reads as follows: "All persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of the state of Washington, when such lands, or any part of the same, are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes." This section was simply declaratory of the existing law, viz., that title acquired under a patent from the United States relates back to the date of settlement or filing. Sturr *v.* Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761. It has never been contended that a mere squatter on public land, who subsequently sells out or abandons his claim, acquires or can acquire riparian rights in a stream flowing through the land. Riparian rights are a mere incident to ownership in the soil, and, while they may relate back by fiction of law to the date of settlement or filing, by virtue of the patent subsequently issued, yet they do not vest until patent issues; for up to that time the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of state legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents.

We are therefore of the opinion that the respondents have a valid claim to the waters awarded them by the court below, superior to any claim on the part of the appellants, and the judgment is accordingly affirmed.

Hadley, C. J., and Fullerton, Dunbar, Mount, and Crow, JJ., concur.

BRODER *v.* NATOMA WATER AND MINING CO.

1879. SUPREME COURT OF THE UNITED STATES

101 *U. S.* 274, 25 *L. ed.* 790

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in this case has title to several parcels of land derived from the United States through which a canal owned by defendant runs for conducting water and distributing the same for

mining, agricultural and other uses. This canal, a very small part of which passes over the lands of the plaintiff, is some fifteen miles long and was completed in the year 1853, and has been in successful operation ever since, under the control and possession of defendant, and it is stated to have cost about $200,000. It is found also as a fact, by the court of the first instance on the trial of this cause, that the canal and branches during all the time since have been uniformly acknowledged and recognized by the local customs, laws and decisions of the courts of the state of California, in which it lies and that the land covered by the canal and its branches is indispensable to its use. At the time the canal was made, and for many years after, in fact up to the passage of the Pacific Railroad Bills of 1862 and 1864, the land through which the canal ran was the public property of the United States. A part of this land is included in the grant made by that act to what has since, by change of name and consolidation of corporate franchises, become the Central Pacific Railroad Company, and the plaintiff by proper conveyance from said company, has become the owner of it. He brings this action in the proper court of the state of California to have the canal declared a nuisance and abated and to recover $12,000 damages on account of the maintenance of the nuisance on his land.

The case was submitted to the court, without a jury and the facts which we have stated, and others that will be referred to, are found by the court.

The inception of the title of plaintiff to the land described in his petition, other than that derived from the railroad company, was a declaratory statement for pre-emption, filed August 6, 1866, by himself for one tract, and a similar statement filed September 14, 1866, by his brother, Jacob Broder, for another. But prior to either of these dates, to wit: on the 26th of July of the same year, congress enacted a law, the purpose of which was to deal with the rights of miners who had theretofore, without objection, and with the tacit encouragement of the United States, discovered, developed and mined the public lands. 14 Stat. at L. 251. The 9th section of that act contains this declaration: "That, wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid: is hereby acknowledged."

As to the canal of the defendant: so far as it ran through the land of the United States, at the date of this act it was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right commenced subsequent to this statute, as to the lands patented

to him and his brother, he took the title subject to this right of way and can not now disturb it.

In reference to the lands of plaintiff held under conveyance from the Pacific Railroad Company, it might be a question of some difficulty whether the right was so far a vested right in that company before the passage of this act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that defendants are under the necessity of relying on that statute.

We are of opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: Atchison *v.* Peterson, 20 Wall 507, 22 L. ed. 414; Basey *v.* Gallagher, 20 Wall. 670, 22 L. ed. 452; Forbes *v.* Gracey, 94 U. S. 762, 24 L. ed. 313; Jennison *v.* Kirk, ante, 240.

We turn now to the act of 1864, 13 Stat. at L., 356, which makes the final grant to the Pacific Railroad Companies, and the acceptance of which by the companies bound them to its terms, and we find in sec. 4, which enlarges the grant of lands made by the act of 1862, this clause of reservation from the general terms of the grant: "Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler or any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist."

We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection. See Wolcott *v.* Des Moines Co., 5 Wall 681, 18 L. ed. 689; Williams *v.* Baker, 17 Wall. 144, 21 L. ed. 561; R. R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634.

In construing the grant to the Pacific Railroad Companies this principle is eminently applicable. The grant of land was vastly larger than any previous grant. The land was surrounded by circumstances much more varied than in any previous grant, and the number and varied character of the interests which might be affected by the vast extent of the donation were beyond any with which congress had previously dealt.

Hence, we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in reservation clause which had become a formula in previous grants.

Not only are prior reservations made by the government, and rights of pre-emption excepted, but the improvements of bona fide settlers, land returned or denominated mineral lands, and the timber necessary to support the miner's improvements, and any other claim, are unaffected by the grant. Of course this means any honest claim evidenced by improvements or other acts of possession.

We can not doubt that the claim of the defendants, of which they had been in possession for twelve years when this act was passed, on which they had expended $200,000 which was of great utility, nay necessity, to a large agricultural and mining interest, was of the class which this section declared should not be defeated by the grant which congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is affirmed.

STURR *v.* BECK

1890. SUPREME COURT OF THE UNITED STATES

133 *U. S.* 541, 10 *Sup. Ct.* 350, 33 *L. ed.* 761

This suit was commenced by Daniel Sturr against Charles W. Beck by a complaint filed in a district court of the territory of Dakota, seeking an injunction against the defendant from interfering with an alleged water-right and ditch of the complainant, and the use of the water of a certain creek through the same, and for damages alleged to have been sustained by interference which had already taken place. The allegations of the complaint were denied in the answer of the defendant, so far as inconsistent with its statements; and the facts in regard to the matters set up in the complaint were averred by the defendant as he claimed them to be, with a prayer for an injunction against the complainant from trespassing upon his land and diverting the water of the creek, and from keeping and maintaining the ditch on his land, and for damages and costs. The cause was tried by the court upon an agreed statement

of facts; it being stipulated that the court might make its findings of fact and conclusions of law on such agreed statement, with the same effect as if the facts therein contained had been proved in court.

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Mr. Chief Justice Fuller delivered the opinion of the court * * *

John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof, May 10, 1883, and received a patent from the United States. The water of False Bottom creek flowed, in its natural channel, over and across Smith's homestead; and in May, 1880, Sturr, the appellant, went upon that homestead, located a water-right thereon, and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed. It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant, nor an adverse enjoyment, so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land, and its beneficial use, protects him from interference, because neither Smith nor Beck made any water-right location, claiming the waters of False Bottom creek, and had never diverted those waters prior to Sturr's location. If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of March 25, 1879, and possession thereunder, or if his patent took effect, as against Sturr, by relation, as of that date, then it is conceded that Sturr can not prevail, and the judgment must be affirmed.

That the right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters is a natural incident to, or one of the elements of, his estate, and that it can not be lawfully diverted against his consent, is not denied; nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor, or a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water-right. At that time, Smith had been in possession for three years, and his homestead entry had been made over a year. A claim of the homestead settler, such as Smith's, is initiated by an entry of the land, which is effected by making an application at the proper land-office, filing the affidavit, and paying the amounts required by secs. 2238 and 2290 of the

Revised Statutes. Under sec. 2291, the final certificate was not to be given or patent issued "until the expiration of five years from the date of such entry." But under the third section of the act of May 14, 1880, ch. 89, 21 St. 141, providing that "any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application, and perfect his original entry in the United States land-office, as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws," the ruling of the land department has been that, if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement. Under sec. 2297 of the Revised Statutes it is provided that upon change of residence or abandonment, as therein mentioned, before the expiration of the five years, "then and in that event the land so entered shall revert to the government." It was held by Attorney General McVeagh, in an opinion to the Secretary of War, July 15, 1881, that "where a homestead entry of public lands has been made by a settler the land so entered can not, whilst such entry stands, be set apart by the president for a military reservation, even prior to the completion of full title in the settler:" that "upon the entry a right in favor of the settler would seem to attach to the land which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions, in the event of which he becomes invested with full and complete ownership; and, until forfeited by failure to perform the conditions, it must, I think, prevail, not only against individuals, but against the government." 1 Land Dec. 59, 60. And many rulings of the interior department sustain this view. These official utterances are entitled to great respect at the hands of this court, as remarked by Mr. Justice Lamar in Railroad Co. *v.* Whitney, 132 U. S. 357, 366, ante, 112.

In Witherspoon *v.* Duncan, 4 Wall. 210, 218, it is said by Mr. Justice Davis, speaking for the court, that "in no just sense can lands be said to be public lands after they have been entered at the land-office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * * The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper con-

veyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title." It may be said that this language refers to the certificate issued on final proofs; but if the word "entry," as applied to appropriations of land, "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim," Chotard *v.* Pope, 12 Wheat. 586, 588, the principle has a wider scope. In Railroad Co. *v.* Whitney, ubi supra, an affidavit for the purpose of entering land as a homestead was filed on behalf of one Turner, in a local land-office in Minnesota, on May 8, 1865, Turner claiming to act under sec. 1 of the act of March 21, 1864, 13 Stat. 35, now sec. 2293 of the Revised Statutes of the United States. As a matter of fact, Turner was never on the land, and no member of his family was then residing, or ever did reside, on it; and no improvements whatever had ever been made thereon by any one. Upon being paid their fees, the register and receiver of the land-office allowed the entry; and the same stood upon the records of the local land-office, and upon the records of the general land-office, uncanceled, until September 30, 1872. Between May, 1865, and September, 1872, congress made a grant to the state of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, through certain counties, to a point on the western boundary of the state, which grant was accepted by the legislature of the state of Minnesota, and transferred to the Hastings & Dakota Railroad Company, which shortly thereafter definitely located its line of road, by filing its map in the office of the commissioner of the general land-office. All these proceedings occurred prior to the 30th of September, 1872. This court declared that the almost uniform practice of the department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption, settlement, sale, or grant until the original entry be canceled or be declared forfeited, in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws; and it was held that whatever defects there might be in an entry, so long as it remained a subsisting entry of record, whose legality had been passed upon by the land authorities, and their action remained unreversed, it was such an appropriation of the tract as segregated it from the public domain, and therefore precluded it from subsequent grant, and that this entry on behalf of Turner "attached to the land" in question, within the meaning of the act of congress making the grant, 14 Stat. 87, and could not be included within it. And, as to mere settlement, with the intention of obtaining title under the pre-emption laws, while it has been held that no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against

each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. "The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." Shepley *v.* Cowan, 91 U. S. 330, 337.

Section 2339 of the Revised Statutes, which is in substance the ninth section of the act of congress of July 26, 1866, 14 Stat. 253, provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." This section, said Mr. Justice Miller, in Broder v. Water Co., 101 U. S. 274, 276, "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." By section 17 of the act of July 9, 1870, amendatory of the act of July 26, 1866, it was provided, among other things, that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under, or recognized by, the ninth section of the act which this act is amendatory." 16 Stat. 218. And this was carried forward into sec. 2340 of the Revised Statutes, and Smith's patent was subject to that reservation. The ninth section of the act of 1866 is referred to by Mr. Justice Field in Atchison *v.* Peterson, 20 Wall. 507, 512; and in the opinion it is said that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams." When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and can not be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy, with intent to appropriate the land, should have the same effect.

The Dakota Civil Code contains this section: "Sec. 255. The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the nat-

ural spring from which it commences its definite course, nor pursue nor pollute the same." Levisee, Codes Dak. (2d ed.) 781. By sec. 527, which is sec. 1 of an act relating to water-rights, passed in February, 1881, it is provided: "Any person or persons, corporation or company, who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said territory for mining, milling, agricultural, or domestic purposes; provided, that the right to such use shall not interfere with any prior right or claim to such waters, when the law has been complied with in doing the necessary work." Id. 861. Section 650, Code Civ. Proc., is as follows: "Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done the same, also an action to recover the possession thereof, in the same manner as if he possessed a fee-simple title to said lands." Id. 171. The local custom is set forth in the findings to have consisted in the recognition and acknowledgment of "the right to locate water-rights, and to divert, appropriate, and use the waters of flowing streams for purposes of irrigation when such location, diversion, and use do not conflict or interfere with rights vested and accrued prior thereto. Thus, under the laws of congress and the territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether, as against Sturr, his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect. The judgment is affirmed.

Mr. Justice Brewer was not a member of the court when this case was submitted, and took no part in its decision.

POPE ET AL. *v.* KINMAN ET AL.

1879. SUPREME COURT OF CALIFORNIA.

54 *Cal.* 3

The plaintiffs are the owners of a tract of land described in the complaint, forming part of the Rancho Muscupiabe, a Mexican grant, patented June 22, 1872. Lytle creek is a water-course ris-

ing upon government lands, about six miles above the ranch, and flowing through the lands of the plaintiffs, and through the San Bernardino rancho, adjoining. Some of the defendants are owners of portions of one or the other of these ranchos, and others are owners of public lands, acquired from the government, or occupants of such lands of which the title is still in the government, all lying below the Muscupiabe ranch.

The predecessors of the defendants diverted and appropriated all the water of the creek in 1856, or before, and there has been an adverse and exclusive use of the water by the defendants and their predecessors ever since. The defendants claim a right to the exclusive use of the water; and the action was brought to quiet the title of the plaintiffs against this claim. The other facts are stated in the opinion.

H. C. Rolfe and J. B. Harmon, for appellants, cited Wilkins *v.* McCue, 46 Cal. 656; Gardner *v.* Miller, 47 Id. 570; Henshaw *v.* Bissell, 18 Wall. 255.

Byron Waters and C. W. C. Rowell, for respondents, cited U. S. Rev. Stats., secs. 2339, 2340.

By the COURT:

1. The patent to the Muscupiabe ranch was issued in 1872, in the month of June, and this action was commenced in May, 1877, and the statute of limitations can therefore have no application.

2. For the same reason the defendants can claim nothing as against the owners of the Muscupiabe ranch, by reason of the lapse of time since their alleged appropriation of the waters of Lytle creek.

3. No controversy is made in this action as to the rights of those defendants who are riparian proprietors of the stream by reason of their ownership of the San Bernardino ranch. The principal question presented is, as to whether it is competent to the defendants, by the mere diversion of the waters of Lytle creek, which is an unnavigable natural stream, flowing across the Muscupiabe ranch (the land of plaintiffs), to deprive the plaintiffs of all interest or right of any nature in the waters of that creek. As being owners of the land, the plaintiffs have an interest in the living stream of water flowing over the land; their interest is that called the riparian right. It is not necessary, in this case, to define in detail the precise extent of the riparian right as existing in this country; it is enough to say that under settled principles, both of the civil and common law, the riparian proprietor has a usufruct in the stream as it passes over his land. The judgment of the court below deprived the plaintiffs of this usufruct, and declares in terms "that plaintiffs have no right, title, or interest in said waters or any portion thereof."

The judgment of the court below is therefore modified so as to read as follows:

First. That the defendants have nothing as against plaintiffs

except only such rights as any of them may have of like character with that of plaintiffs as being riparian proprietors of land bordering on said stream.

Second. That none of the defendants have any right, title or interest in plaintiffs' said premises described in the complaint, and they are precluded from setting up any right, title, or interest in said premises, and particularly from any claims therein to the use of ditches upon plaintiffs' said premises, or to the waters of said Lytle creek, except as riparian proprietors as aforesaid.

Third. That plaintiffs have and recover from the defendants their costs and disbursements incurred in this action, amounting to $270.80, together with costs of this appeal.

Remittitur forthwith.

DESERT LAND ACT

U. S. Comp. Stat. 1901, pp. 1548-1549 and 1551

Act March 3, 1877, ch. 107. (As amended 1891)

An Act to Provide for the Sale of Desert Lands in Certain States and Territories. 19 Stat. 377

Be it enacted, etc., That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclama-

tion of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Provided, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

Sec. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

Sec. 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land office.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the state of Colorado, as well as the states named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located.

Act March 3, 1891, ch. 561, sec. 2, 26 Stat. 1096.

HOUGH ET AL. *v.* PORTER ET AL.

1909. SUPREME COURT OF OREGON

51 *Ore.* 318, 98 *Pac.* 1083

KING, C.: The principal contention of appellants as first urged was that the court acted without jurisdiction in directing that all persons interested in the lands bordering on Silver creek, its tributaries and channels, be made parties to the suit, and that such action on the part of the court constituted reversible error. These questions of practice with matters incidental thereto, were determined adversely to counsel's contention, 95 Pac. 732, and the cause was set down for further argument on the main points involved, principal among which is that of riparian rights, as affected by Act Congress,

March 3, 1877, ch. 107, 19 Stat. 377, U. S. Comp. Stat. 1901, p. 1548, known as the "Desert Land Act." 95 Pac. 752. This question and the points formerly determined were fully discussed at the reargument. After a reconsideration of the questions of practice presented we find no reason to depart from the conclusions announced in our former opinion.

We come, then, to a consideration of the desert land act, as to its effect upon the parties hereto owning lands upon the streams involved, the rights of each of whom have attached since the passage of the act. This confronts us with the legal problem as to whether any are riparian owners, and, if so, to what extent and what bearing their claims as such have upon the water rights in question. It has become a matter of history that prior to any laws upon the subject the use of water was exercised under a custom permitting any person to go upon a stream, or other source of water supply upon the public domain, and divert water therefrom wherever and whenever needed, provided the use thereof did not interfere with the prior rights of others. In other words, priority in the diversion and use determined the rights of all conflicting claimants. This procedure was encouraged and acquiesced in by the government for many years throughout the Pacific Coast states, until in recognition thereof Act Congress July 26, 1866, ch. 262, sec. 9, 14 Stat. 253, 7 Fed. St. Ann. 1090, U. S. Comp. Stat. 1901, p. 1437, was adopted which provided: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed. * * *" This act constituted a recognition of pre-existing rights rather than a creation of any new one, and accordingly recognized and assented to appropriation of water in contravention to the common-law rule as to continuous flow. Broder *v.* Water Company, 101 U. S. 274, 25 L. ed. 790; United States *v.* Rio Grande Irr. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; Gutierres *v.* Albuquerque Land Co., 188 U. S. 545, 23 Sup. Ct. 338, 47 L. ed. 588; Davis *v.* Chamberlain, 51 Ore. 304.

Supplemental to the above act, provision was made by Congress July 9, 1870, for incorporating a reservation in favor of such rights in all patents when issued, as follows: "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights. * * *" Rev. State., sec. 2340, U. S. Comp. Stat. 1901, p. 1437. This was followed on March 3, 1877, by what is known as the "Desert Land Act," parts of which, in so far as material to this discussion, are: "That it shall be lawful for any

citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. * * *" 19 Stat. U. S. 377, 6 Fed. Stat. Ann. 392, U. S. Comp. Stat. 1901, p. 1548.

The title of the foregoing act reads: "An act to provide for the sale of desert lands in certain states and territories." Being an act of Congress, it is well known that it is not required that the title of the act embrace all its provisions; and, while a different rule prevails in some of the states, it is probably an exception rather than the rule that acts of Congress are limited to matters contained in their title. This being the rule which prevailed in Congress, we have only to look to the body of the act to ascertain its intention. After providing for the reclamation of arid lands and for the procuring of title thereunder, it will be observed that, in this act, as essential to the reclamation of lands, the water right, when located by the person taking the land, shall depend upon bona fide prior appropriation. The reason for this is apparent. The object and purpose of the act was by this method to reclaim, develop and make productive arid lands or those of a desert character, which as a rule were nonriparian. For many years it was an open question whether lands through which streams flowed in their natural channels were subject to reclamation under this act. Sims *v.* Phalen, 11 Land Dec. Dep. Int. 206. But it was finally determined that such lands could be reclaimed where clearly shown to be of a desert character. Houck *v.* Bettelyoun, 7 Land Dec. Dep. Int. 425; Nilson *v.* Anderson, 23 Land Dec. Dep. Int. 139. Considering this feature with the then long-existing conditions in reference to the public lands throughout the West, the reasons for providing that the water right should be acquired under the doctrine of prior appropriation are obvious.

This first act (1866) refers to priority of possession and local customs, rules, regulations, etc., to which rules of construction were soon applied; the outcome depending largely upon whether the deci-

sions were by courts in localities of a strictly arid nature or in the humid states. If in a strictly arid section, the doctrine of prior appropriation prevailed; while, if humid, a middle ground, or what is called the "modified doctrine of riparian rights," appears to have been the one adhered to and deemed the most conductive to the public welfare. Near the time of the passage of this act conflicts had arisen from the application of the law, as applied to riparian rights, in the arid and semi-arid West. In California the effect thereof on riparian rights was involved in much doubt and not fully determined, while in Nevada the noted case of Vansickle *v.* Haines, 7 Nev. 249, had been decided, adhering to the common-law rule on the subject. This latter case, however, was subsequently overruled, since which time the doctrine of prior appropriation has there prevailed. Jones *v.* Adams, 19 Nev. 78, 3 Am. St. 788; Reno S. Works *v.* Stevenson, 20 Nev. 269, 4 L. R. A. 60, 19 Am. St. 364; Walsh *v.* Wallace, 26 Nev. 299, 99 Am. St. 692. The act of 1866 had left somewhat in doubt, not only the question of its effect upon riparian rights, but an uncertainty whether it thereby intended to establish a permanent rule upon the subject; and the act of 1870, requiring reservations in all patents issued, by inserting a statement therein to the effect that the patents were executed subject to vested and accrued water rights, etc., was evidently intended as a precautionary measure to remove doubts then extant as to the legal effect of any patents subsequently issued, so far as applicable to any rights acquired before the date thereof.

In order, therefore, to remove such doubts and to establish a uniform rule throughout the states mentioned in the act, whereby all appropriations made from streams flowing through public lands over which congress had power to legislate, after the provisions specifying the manner in which lands taken under the act could be reclaimed, there was added the clause: "And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." 19 Stat. 377, U. S. Comp. St. 1901, p. 1549. This reservation of water rights for the benefit of the public was clearly not essential to any of the other provisions of the act. The previous statement contained sufficient to define and protect the rights of those selecting lands under the desert land act; but the added proviso, or something of similar import, was essential to the establishment of a clear and uniform rule upon the subject as regards all appropriations thereafter to be made from streams or other bodies of water upon the public lands and to which such might be riparian. The words "shall remain and be held free for the appropriation and use of the public for irrigation," etc., are clearly words of reservation and dedication, and obviously so intended. It is insisted, how-

ever, that the language quoted is insufficient for either a grant, trust or dedication; that a grant presupposes a grantee capable of receiving it; that it is not a trust, because all three essentials necessary to constitute a trust—i. e., trustee, trust res, and cestui que trust—are wanting; that it can not be held to be a dedication, in that the right there alluded to is not an easement, but is usufructuary only, partaking of the nature of real estate, an incorporeal hereditament, analogous to a "profit" in land, in that it depletes the riparian right. It is further observed that a dedication is not a grant and can not arise by grant, since it exists in favor of the entire public, in respect to which it was asserted, as above stated, that it can not become a grantee.

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It would seem, however, that as to what may be the proper term by which any interests thus reserved may be designated, we need not inquire. Nor is it material whether any term has been recognized or established by the courts to cover the privileges and rights reserved or surrendered by the government to the public, or individuals of which the public is composed. Our form of government, Constitution, and powers reserved to the government have necessarily given rise to privileges and rights not fully covered by the common law or by the terms in common use under it. The right of the government to dispose of its public lands, and to deal with all rights incident thereto, in such a manner as it may deem best, has long been fully established and recognized by all decisions upon the subject. True, it can not by legislation determine for any state, after its admission, what the local laws relative to riparian rights shall be, United States *v.* Rio Grande Irr. Co., 174 U. S. 690, 703, 9 Sup. Ct. 770, 43 L. ed. 1136, but the general government, in dealing with its public lands, may provide for their transfer as might any other landed proprietor, and make such reservations therefrom by grant, dedication, or otherwise as it may see fit. Riparian rights may become the subject of a grant or dedication, and may be severed from the soil. Coquille Mill & M. Co. *v.* Johnson, 52 Ore. 547. This principle is clearly and concisely stated in an opinion by Knowles, District Judge, in Howell *v.* Johnson, 89 Fed. 556, 558, as follows: "Being the owner of these [public] lands, it has the power to sell or dispose of any estate therein or any part thereof. The water [in question] in an unnavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper." Decisions to the above effect are too numerous and too well understood to need extensive citation.

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Another and more apt illustration is that of the policy of the national government respecting its mineral lands, in regard to which any one, acquiring title to any part of the public domain

under the homestead or under any other act, takes such land subject to the exception that he does not acquire title to the minerals known to be therein at the time of entry or of patent, whether located for minerals at the time of the inception of the rights of its grantee or not. 5 Fed. Stat. Ann. secs. 2318, 2319, U. S. Comp. Stat. 1901, pp. 1423, 1424; Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. 17.

It was in the exercise of a similar prerogative on the part of the government that there was by the act of 1877 given to the public, or to any individual thereof, the right to appropriate and apply to a beneficial use the waters flowing through its public domain. No limit as to the time in which this right may be exercised is made, except in effect that he who first diverts the water and with due diligence applies it to the uses there enumerated is given the better right thereto. It can make no difference, therefore, whether it be termed a grant, reservation, dedication, trust, or other privilege. This unquestioned power of the owner over the public domain was exercised, and any one entering upon, and acquiring title to, any part of the public domain after the passage of this act accepted such land and title thereto with full knowledge of the law under which the patent was issued; the import thereof being that this right incident to the soil was reserved by the government, to be held in trust for the public, and that he who first applies the water to a beneficial use shall become the owner of the right thereto, and that the recipient of such title takes it subject to that right, which he, in common with others of the public, is privileged to exercise.

* * * * * * *

The manner of making the dedication, as well as its legal effect, must be determined from the act or instrument by which it is made. In the case under consideration it will be observed that the language used is that the surplus waters of the streams and of other sources of water supply designated shall remain and be held free for the appropriation and use of the public for (1) irrigation, (2) mining, and (3) manufacturing purposes. The manner of appropriating and using the water for irrigation, manufacturing, and mining purposes was at that time and has been at all times since well understood; hence the use by the public and manner thereof is specified, meaning, when interpreted in the light of the then existing facts, the usual manner of applying it for power purposes and of diverting it by means of ditches and other systems in use for irrigation, including also the usual methods in use by miners.

It follows that the rights reserved to the public and dedication of the surplus waters therefor were intended for use in that manner. Construed, then, with the act of 1866 and other provisions of the act of 1877, we are of the opinion that all lands

settled upon after the date of the latter act were accepted with the implied understanding that (except as hereinafter stated) the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto. So far as we are able to determine, the question, as here presented, has not heretofore been squarely before any of the courts. But, while not deemed essential to an adjudication therein, we find the act of 1877 considered to some extent in the following cases: Williams *v.* Altnow, 51 Ore. 275; Farm Investment Co. *v.* Carpenter, 9 Wyo. 110, 50 L. R. A. 747, 87 Am. St. 918; United States *v.* Conrad Inv. Co., 156 Fed. 123, 128; United States *v.* Rio Grande Irr. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; Gutierres *v.* Albuquerque Land Co., 188 U. S. 545, 23 Sup. Ct. 338, 47 L. ed. 588; Kansas *v.* Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. ed. 956; State ex rel. Liberty Lake Ice Co. *v.* Superior Court Spokane County, 47 Wash. 310.

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These appear to be the only cases in which the attention of the court has been called to this act, the plain inference from which is that, in the opinion of the eminent jurists quoted, the act of March 3, 1877, was such a reservation by the national government to and for the public and such dedication thereto of all its rights in and to all the waters flowing through its public lands for irrigation, manufacturing, and mining purposes, as to abrogate the modified common-law rules upon the subject, in so far as applicable to all lands entered after that date. But the effect of the language of the act that "there shall remain and be held free for the appropriation and use of the public for irrigation," etc., we think, while constituting words of reservation and dedication, limits the rights thereunder to the deprivation of the riparian lands of the water only in so far as it may be claimed by the riparians for the purposes there enumerated. One of the rights inseparable from the land has always been that the owner of such land was entitled to an adequate supply of water flowing over it for domestic use, together with sufficient for the domestic animals necessary for the proper subsistence and maintenance of the landed proprietor and his family. This necessary use, no doubt gave rise to the doctrine of riparian rights in the earliest development of the law upon the subject, followed by requirements for navigation, next extended to include the right to its use for power purposes, and later to the production of such garden and grains as was essential to the subsistence of the family of such riparian owner. At first the right of all riparians was evidently restricted to the demands upon the stream for the first purposes named. Lastly, as civilization progressed and extended over the semi-arid sections throughout the different nations, the riparian demands accordingly became more extensive and en-

larged to include irrigation, but limited at first, no doubt, to the watering of such garden and other produce reasonably necessary for the riparians' domestic consumption, and as the strictly arid localities became populated, by reason of the correspondingly increased commercial, agricultural and mining development, this right was finally extended to include the irrigation, not only for the limited purposes mentioned, but to the watering of large areas in the production of grains and other agricultural products, together with its expansion thereof to include all its present uses.

The language used in this act was clearly intended to change the rules respecting the right of riparians to the use of water for irrigation, mining, and power purposes; but, as in the last case cited, it has its limits. It does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic use, including the watering of domestic animals and such stock as may be essential to the sustenance of the owners of lands adjacent to the streams or other bodies of water. And as held in the last case cited, although abrogating the common-law rule on the subject, the act was not intended to permit appropriators to deplete the flow to such an extent as materially to impair the navigation of the rivers to which such streams directly or indirectly may be tributaries. The reason for this is plain: To permit an interference with navigation would be to deprive the entire public of a valuable right, which at all times has been recognized as paramount to that of the individual desiring such interference; while to permit an appropriation of water depriving the owner of the land through which it may flow of its use for irrigation affects such person only. So far as the government may be concerned by the depletion of a particular tract of land of such benefit, if any, it is recouped by the reclamation of a like tract for which the diversion causing the injury may be made. However, it can not be presumed that it was the intention of congress to render the soil absolutely worthless by drying the lands by diversion of the waters flowing through them to nonriparian lands as to leave the soil without the water essential to the owner's domestic needs. Presumably the best possible results for all concerned were intended, which it is clear could best be obtained by permitting the settler to retain the quantity of water essential to the sustenance of his family and to other natural wants incident thereto, but, if he does not see proper to apply it to any of the uses specified in the act, then to permit the first home builder on other lands to make such use of it as will bring into cultivation the lands not adjacent to the streams, thereby protecting the settlers upon both classes of lands, and at the same time not only encourage home building but enable the government to dispose of more of its lands, and to enhance its revenues proportionately.

It often happens that an owner of lands in arid districts does not want to farm them, but merely wants a home where he may raise stock or engage in other pursuits, requiring only sufficient water supply to meet the natural wants incident thereto, and for which no artificial diversion or application of the stream may become necessary. It will not, therefore, necessarily be presumed that such settler intends to irrigate his lands, or that he will ever demand the water for such purposes, for which reasons congress evidently intended by the language used in the act of 1877 that, if desired for such purposes, some manifestation thereof by diversion or other sufficient notice should be given, and, if not desired for the reclamation of his lands, that the owner should not be permitted to complain if another shall so apply it. But, as regards the requirements for domestic use, the settlement, or other steps taken looking towards the procurement of title thereto, gives ample notice that the water for all necessary domestic uses is, and will continue to be, demanded as appurtenant to the land entered, as much so as would a diversion of the water for such purposes; while, if intended to be appropriated for irrigation, mining, or power purposes, some affirmative action in that direction is essential, and it is but reasonable to require a clear manifestation of an intent or notice thereof. This requirement is vital to the initiation of such a right, for the same reason that some notice is exacted for the entry of the land itself. Congress could reasonably presume that, if an appropriation were desired for the purposes mentioned in the act, some steps would be taken manifesting such intent, and that, if the owner is not the first to move in that direction, the person making an application thereof to a beneficial use within a reasonable time ought to be rewarded for his diligence, and he is entitled to have his rights in that respect recognized and protected. For this reason the settler who has acquired title to the land through which any stream may flow took it subject to the rights of the person who has or who may subsequently make the first use of such stream for the purposes enumerated in the act, excepting only as to the natural wants and needs of such settler.

Our attention is called to references in our statute to riparian rights, B. & C. Comp. secs. 4994, 5000, which, it is argued, recognize the doctrine of riparian rights as being in force in this state, regardless of the act of congress under consideration. It could with equal strength be maintained that sec. 5002, Id., which provides that "all controversies respecting rights to water under this act shall be determined by the dates of the appropriations as respectively made by the parties," constitutes a declaration to the effect that the doctrine of prior appropriation shall prevail. The statute does not attempt to define riparian rights, nor to determine the extent or effect of the doctrine as applied to irrigation.

It has reference only to such rights as such riparian owner as the proprietor may have, whatever they may be; and the question as to what such rights are, and since 1877 have been, is the one under consideration here. Owners of land adjacent to bodies of water have riparian rights other than those presented in this controversy. See Morton *v.* O. S. L. Ry. Co., 48 Ore. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. 827; Coquille Mill & Min. Co. *v.* Johnson, 52 Ore. 547. As hereinbefore held, the act of 1877 only affects riparian rights to lands the title to which has been acquired since that date, and then only in so far as a claim to the use of water may be asserted as riparian owner for the purposes in the act enumerated. And in this connection it will be observed that sec. 5000, B. & C. Comp., protects the owner contiguous to the stream, as against those claiming under the act of which that section is a part, in his right to the flow of the stream to the extent required for household, domestic, and other uses incident thereto, with sufficient quantity for irrigation purposes to the extent then actually needed and in use. An exception to that extent is accordingly made in favor of the landowner, as against, and only to the extent of, such rights as may be asserted under the act.

Our attention is called to Sturr *v.* Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761. That was a controversy between a riparian owner and a subsequent, but prior, appropriation, and was submitted on an agreed statement of facts. Based upon these stipulations, the trial court made findings, among which was that the defendant's first settlement upon his land through which the stream flowed was in March, 1877, and that he made a homestead filing thereon on the 25th of the same month. These findings were conclusive upon the Appellate Court. The date alluded to does not disclose whether the settlement was prior or subsequent to March 3, 1877, the date of the desert land act. Owing, therefore, to the uncertainty as to the date of settlement, this decision can not be held in point. And the further fact that no reference appears as to the exact date clearly indicates that either the settlement was made before that date, or that the question did not occur to the litigants and was accordingly not urged before the court, nor considered by it.

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We come, now, to the adjudications in this state. While it is urged that the decisions of this court have recognized a doctrine inconsistent with that here enunciated, our attention is not directed to any where the question, as here presented, has been before the court or in any manner urged or submitted. Nor have we been able to find such a case. Numerous suits have arisen where the riparian questions have been urged, considered, and discussed, and in some respects determined; but in none does it

appear that the lands were entered after the date of the act under consideration. If in fact the titles to lands involved in some of the cases were obtained since the date of the act, the court's attention was not directed thereto, and it is well settled that no case can be deemed a precedent binding upon the court unless the point in question was there presented or considered.

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Other illustrations in this state might be given, where the titles to the lands affected by the waters involved were obtained since 1877, and where no reference was made thereto in any opinion filed thereon; but, like the above, and for the reasons given, they are not in point.

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It follows that the decree of the court below should be modified, and one entered, as between all the parties hereto, whether plaintiffs or defendants, establishing their relative rights in harmony with the views here expressed.

STILL ET AL. *v.* PALOUSE IRRIGATION AND POWER CO. ET AL.

1911. SUPREME COURT OF WASHINGTON

64 *Wash.* 606, 117 *Pac.* 466

MORRIS, J.: It was sought in this suit to enjoin defendants from constructing and maintaining a dam across the mouth of Rock lake for the purpose of utilizing the lake as a storage reservoir. The court below so decreed as to the defendant Irrigation & Power Company, from which this appeal is taken.

Rock lake is a navigable body of water, about nine miles long and from one-half a mile to three miles wide. Its outlet is Rock creek, which flows westerly to a junction with Palouse river. Respondents are the owners of lands about ten miles west of Rock lake, through and across which Rock creek flows. The appellant company is the owner of lands bordering the mouth of the lake, also lands riparian to the Palouse river below its junction with Rock creek, and other lands still further down in the Washtucna coulee. Respondents' lands are in four tracts, and were acquired at different times—two tracts by federal patent in 1901 and 1902, and two by purchase from federal grantees in 1897 and 1904. Rock creek is a small stream, but in the late winter and early

spring the rains and melting snow cause the waters of the lake to rise, increasing the flow of the creek until it flows through natural channels over respondents' lands, covering in flood season about 100 acres, which, by reason of its deposits and watering the land at a time when the crops are dormant, is of great benefit to respondents. For the purpose of utilizing these flood waters and controlling the flow over their lands, respondents have constructed small dikes and dams across the overflow channels. They have also a small irrigating system to reach lands not covered by the overflow. The appellant company in 1909 and 1910 constructed a dam three feet high across the mouth of the lake; its purpose being to use the lake as a reservoir for the impounding of its waters. The dam is constructed with gates, and the contemplated purpose is to leave the gates open until the flood waters of the early spring rise above the dam, when the gates will be closed, and a body of water, three feet deep over the entire area of Rock lake, about 6,600-acre feet of water, impounded for use in the summer months, in the irrigation of appellant's lands upon the Palouse river and in Washtucna coulee. The court below found that the erection and maintenance of this dam as contemplated by appellant would be unreasonable detention and obstruction of the wonted flow of Rock creek over and through respondents' lands, and entered a decree accordingly.

There can be no doubt but that the scheme of appellant, if permitted to impound the waters of the lake in the spring months, would cause a serious interference with respondents' use of the waters of Rock creek, diminishing and curtailing its natural flow, wholly preventing the annual spring overflow upon respondents' lands, which is their greatest asset and factor of value, except as appellant might at its option release the waters of the lake through the gates of its dam. Such an alteration in the natural flow of a stream is not permissible. A riparian owner, such as respondents are here shown to be, has a right to the natural flow of waters in their natural and accustomed channels without diminution or alteration, subject only to the same rights and use in every other riparian owner, a right that is as much included in the ownership of the land as the soil itself, and can no more be interfered with by the acts of others. And, while the application of this doctrine has in some of the Western states sometimes been denied on the theory that the rules of the common law respecting riparian owners were inapplicable to conditions and necessities of the people in the particular localities where the cause of action arose, it has since its first announcement here invariably been upheld in this state, except where it has been subjected to a priority of appropriation. Crook *v.* Hewitt, 4 Wash. 749; Rigney *v.* Tacoma Light & Power Co., 9 Wash. 576, 26 L. R. A. 425; Benton *v.* Johncox, 17 Wash. 277, 39 L. R. A. 107, 61 Am. St. 912; New Whatcom *v.* Fairhaven Land Co., 24 Wash. 493, 54 L. R. A. 190;

Madson *v.* Spokane Valley Land Co., 40 Wash. 414, 6 L. R. A. (N. S.) 257; McEvoy *v.* Taylor, 56 Wash. 357, 26 L. R. A. (N. S.) 222. The contemplated detention of the waters of Rock creek through their impounding in the lake practically amounts to a total detention at unknown times, when, with their natural spring flow, they would be serving their best purpose to respondents. Water may not thus be gathered into reservoirs for future use, when it may best suit the convenience and use of one riparian owner, and thus deprive other riparian owners of their use and service of the stream in its natural condition, unless such right is exercised under a valid prior appropriation. Monroe *v.* Menzel, 35 Wash. 487, 70 L .R. A. 272, 102 Am. St. 905.

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It is next contended that the doctrine of riparian rights, except as to water for domestic purposes, has been entirely abrogated as to all lands through which nonnavigable streams flow, the title to which has been acquired from the government of the United States subsequent to the Act of Congress approved March 3, 1877, Act March 3, 1877, ch. 108, 19 Stat. 377, providing, among other things: "And all surplus water over and above such actual appropriation and use, together with the water in all lakes, rivers, and other sources of water supply, upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing right." This contention has been suggested by two Oregon cases—Williams *v.* Altnow, 51 Ore. 275. and Hough *v.* Porter, 51 Ore. 318. The act itself manifestly relates only to the reclamation of desert lands and confines the use of the water to the amount "actually appropriated and necessarily used for the purposes of irrigation and reclamation," such right to be determined by bona fide prior appropriation. As to such lands, congress recognized and assented to the appropriation of water in contravention of the common-law right of the lower riparian owner to insist on the continuous flow of the stream. This court has always recognized the doctrine of prior appropriation of water on public lands as superior to all other claims. while it has also recognized the common-law right of the riparian owner against all but bona fide prior appropriators. Benton *v.* Johncox, 17 Wash. 277, 39 L. R. A. 107, 61 Am. St. 912; Sander *v.* Wilson, 34 Wash. 659. None of the lands now owned by respondents and riparian to Rock creek were settled upon or claimed as desert lands under the act of 1877. Nor does any right attach to such lands by virtue of such act. Neither can we find any valid and existing appropriation of this water by appellant or any grantor prior to the vesting of riparian rights in respondents in 1897, although several attempts to make a valid appropriation had been made prior to that time, under which appellant claims. These appropriations extend as far back as 1892, but it does not

appear that the appropriators have employed such diligence in carrying out their irrigation projects as to keep their appropriation alive.

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We can find no diligence with such a record, and nothing that indicates anything other than an abandonment. If not an abandonment, it was certainly not such a continuous use as to amount to a bona fide appropriation against the rights of others, diligently and continuously used and asserted.

Concurring with the court below in its finding and conclusions, the judgment is affirmed.

Crow, Ellis and Fullerton, JJ., concur.

RENO SMELTING, MILLING AND REDUCTION WORKS *v.* STEVENSON ET AL.

1889. SUPREME COURT OF NEVADA

20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. 364

BELKNAP, J.: This action is brought for the purpose of determining rights to the use of water upon the following facts: The plaintiff is a corporation engaged in the reduction of ores. It is the owner in fee of ten acres of land on the Truckee river, upon which its reduction works are situated. Long prior to the commission of the grievances alleged in the complaint it built a dam in the river at a point above its own land, but with the consent of those whose lands were affected thereby. The water is used to furnish power to operate machinery at the works, and is conveyed from the dam by means of a ditch and flume. The height of the dam is such that the waters of the river flow over it about ten inches above its crest, and, unless the water is maintained at this height, sufficient can not be diverted to fill the ditch and flume. The state of Nevada is the owner in fee of the land next below that of the plaintiff on the river. The insane asylum of the state is situated thereon, and the defendants, by virtue of their offices of governor, comptroller, and treasurer of the state, respectively, are commissioners for the care of the insane, and, as such, control the affairs of the asylum. In their capacity as commissioners they have caused the pond of water made by the dam of the plaintiff to be tapped by a flume, and thereby carried a portion of the waters to the asylum grounds for motive power. The district court enjoined this diversion of the waters. Plaintiff upon this appeal neither claims nor disclaims a right by virtue of a prior appropriation, but urges an affirmance of the judg-

ment upon the sole ground that it is a riparian proprietor, and, as such, is entitled to the natural flow of the water through its land.

The rights of riparian proprietors are thus stated by Chancellor Kent: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run, *currere solebat*, without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. A*qua currit et debet currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietor above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it." 3 Kent, Comm. 439. "It is wholly immaterial," says Judge Story in Tyler *v.* Wilkinson, 4 Mason, 400, "whether the party be a proprietor above or below, in the course of the river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." But the rule of the common law has never been applied by the courts of this state, except as hereinafter mentioned. The condition of settlers upon the public lands of the state necessitated a diversion of running waters from their natural channels for agricultural purposes, and our courts have, with the exception stated, protected the first appropriator to the extent of his appropriation to any beneficial use, and no obligation has been imposed upon him to return the water to its natural channel. The history of this subject is clearly stated by Mr. Justice Field in Atchison *v.* Peterson, 20 Wall. 510, as follows: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placer, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law, declara-

tory of the rights of riparian owners, were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection." Referring to the rule as above stated, and which accords to the different riparian proprietors an equal right to the use of the waters of the stream, the opinion proceeds: "This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories." And in Basey *v.* Gallagher, Id. 670, after referring to the views above quoted, the court say: "The views there expressed and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those states and territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In the case of Vansickle *v.* Haines, 7 Nev. 249, it was held that the patentee of the government succeeded to all of its rights, and among these was the right to have the water of a stream theretofore diverted returned to its natural channel. In that case the patent of the government had been issued prior to the passage of the Act of Congress of July 26, 1866. The court considered the statute prospective in its nature, and that it did not apply to that patent. Subsequently, in the case of Broder *v.* Water Co., 101 U. S. 274, the Supreme Court of the United States declared that the statute was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one; and, following this view, the construction given to the statute in Vansickle *v.* Haines was overruled in Jones *v.* Adams, 19 Nev. 78. Again, in Vansickle *v.* Haines, the court considered that the language of the statute adopting the com-

mon law precluded a consideration of the question of its applicability. The statute is as follows: "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state." Gen. Stat. 3021. This was substantially the statute when Vansickle *v.* Haines was decided. The statute is silent upon the subject of the applicability of the common law, but we think the term "common law of England" was employed in the sense in which it is generally understood in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition. An examination of the authorities will render this apparent.

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From these authorities we assume that the applicability of the common-law rule to the physical characteristics of the state should be considered. Its inapplicability to the Pacific states, as shown in Atchison *v.* Peterson, supra, applies forcibly to the state of Nevada. Here the soil is arid, and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the state is table land, traversed by parallel mountain ranges. The great plains of the state afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration, and conclusive evidence of the inapplicability of the common-law rule. The system which the necessities of the people established was recognized and confirmed by the legislation of congress —First, by the act of July 26, 1866, which declares, in its ninth section, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *" and, second, by the desert land act, which encourages the appropriation and use of water upon such of the public lands as will not, without irrigation, produce an agricultural crop, by authorizing the sale of a greater amount of such land than the purchaser could otherwise acquire, upon proof of his having conducted water upon it for the purpose of irrigation. This act applies only to the Pacific coast states and territories. U. S. Stat. 1877, p. 377. The legislature of the state also has encouraged the diversion of water by an act approved March 3, 1866, the general object of which is expressed in its title, as follows: "An act to allow any person or persons to divert the waters of any river or stream and run the same through any ditch or flume, and to provide for the right of way through the lands of others." Gen. Stat.

secs. 362-365. And the adjudication of the courts, with the exception mentioned, have sustained the doctrine of appropriation upon which the people acted. That the doctrine should be upheld, as well after the issuance of the patent of the government as before, we quote the views of Mr. Justice Ross, in a dissenting opinion in Lux *v.* Haggin, 69 Cal. 450. "The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for forty acres, or some other subdivision of the public land, bordering on the river or other stream of water. It was, as has been said, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water-rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute-books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state, and of the legislation and decisions with respect to the subject in question, is it possible that either government, state or national, ever contemplated that conveyance of forty acres of land at the lower end of a stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream upon the public lands above, and entitle the grantee of the forty acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated." The case of Coffin *v.* Ditch Co., 6 Colo. 443, recognizes appropriation as the law of the state of Colorado. Some of the principles announced in that case are applicable here. "It is contended by counsel for appellants," say the court, "that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rain-fall, is arid, and unproductive. Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate or right of property. It has always been the policy of the national, as well as the territorial and state, governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing, by irrigation, portions of our unproductive territory. * * *

The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection, as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant." Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our state, and that this case should have been determined by the application of the principles of prior appropriation. Judgment reversed, and cause remanded for a new trial.[57]

BOQUILLAS LAND AND CATTLE COMPANY *v.* CURTIS.

1909. SUPREME COURT OF THE UNITED STATES.

213 U. S. 339, 29 Sup. Ct. 493, 53 L. ed. 822

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellant to prevent the defendants from withdrawing water from the San Pedro river, and from building for that purpose a dam and ditch upon and through the plaintiff's land. The plaintiff owns a tract extending on both sides of the river for about fourteen and one-half miles and reaching back from the river for a mile and one-eighth on each side. It derives its title from a grant of the state of Sonora in 1833, confirmed by a decree of the court of private land claims on February 14, 1899, and a patent from the United States in pursuance of the decree, dated December 14, 1900. By reason of disputes before the date of the patent and wrongful disputes since, the plaintiff has not made actual use of all the waters of the river, although they are not sufficient to irrigate all the plaintiff's land that admits of irrigation. It has constructed no dams, canals, or the like, and has not taken the water except for watering stock and other similar uses of it in its natural flow. The defendants threaten and intend to build a dam, as alleged, in place of one built in 1903, but washed out, and to build and rebuild a ditch through land of the plaintiff to another ditch already established, and to divert the water through the same to land of theirs on the north. They set up no title, except that they have

[57] See Coffin *v.* The Left Hand Ditch Co., 6 Colo. 443; United States Freehold Land and Emigration Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470; Sternberger *v.* Seaton Mining Co., 45 Colo. 401, 102 Pac. 168; Empire Water & Power Co. *v.* Cascade Town Co., 205 Fed. 123; Hutchinson *v.* Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059; Colo. Const., art. 16, §§ 5, 6; Colo. Stat. Ann., § 3165; Crippen *v.* White, 28 Colo. 298, 64 Pac. 184.

been the first to appropriate the water. The plaintiff claims as riparian owner, and argues that, as such, it has a right that can not be taken from it by simple appropriation. The territorial court of first instance and the Supreme Court dismissed the bill, 89 Pac. 504, and the plaintiff appealed to this court.

It is not denied that what is called the common-law doctrine of riparian water rights does not obtain in Arizona at the present day, Arizona Rev. Stat. 1887, sec. 3198, but the plaintiff contends that it had acquired such rights before that statutory declaration, and that it can not be deprived of them now. So far as the claim is rested on the original grant and the Mexican law, it may be disposed of in a few words, without going into all the questions that would have to be answered before an opposite conclusion could be reached. "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that, in the state of Sonora, the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this territory irrigation was practiced in the Santa Cruz valley prior to the cession, and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom." This is the statement of the territorial court, and we know nothing to control it. It is not met by arguments as to the general character of Mexican law, or by inference from the situation and nature of the grant. The same doctrine seems to be implied by the Howell Code, ch. 55, sec. 25, which we shall refer to again.

The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, but releases that of the United States, Beard *v.* Federy, 3 Wall. 478, 491, 18 L. ed. 88, 92, and that, by the grant from the United States, it gained rights as a riparian proprietor that could not be displaced by a subsequent attempt to appropriate the water, Sturr *v.* Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761. But, while it is true that in Beard *v.* Federy, supra, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid; so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words that are foreign to the business of confirmation." Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign, it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and,

in the most pertinent passage, directing a patent to be issued, says that it shall be issued "to the confirmee." Act of March 3, 1891, ch. 539, sec. 10, 26 Stat. at L. 854, 859, U. S. Comp. Stat. 1901, pp. 765, 771. It would be possible, perhaps, to argue to the contrary from provisions in sections 8 and 13, that the confirmation shall only work a release of title by the United States, but we are satisfied that the true intent of the statute and the reason of the thing are as we have said.

The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions, patented after the act of March 3, 1877, ch. 107, 19 Stat. at L. 377, U. S. Comp. Stat. 1901, p. 1548, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act, construed with Rev. Stat. sec. 2339, U. S. Comp. Stat. 1901, p. 1437. The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds. Hough *v.* Porter, 51 Ore. 318. See further, act of March 3, 1891, ch. 561, sec. 18, 26 Stat. at L. 1101, U. S. Comp. Stat. 1901, p. 1570; United States *v.* Rio Grande Dam and Irrig. Co., 174 U. S. 690, 704-706, 19 Sup. Ct. 770, 43 L. ed. 1136, 1142, 1143; Gutierres *v.* Albuquerque Land and Irrig. Co., 188 U. S. 545, 553, 23 Sup. Ct. 338, 47 L. ed. 588, 592. So it is unnecessary to consider how far, if at all, the defendants represent an appropriation of the water before the patent was granted. For that reason we have not set forth the details found by the court below as to the dams, ditches and use of water, going back to 1877.

But, perhaps, the main contention of the plaintiff is based on the legislation of the territory, and especially on the Howell Code of 1864, ch. 61, sec. 7, as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States, or the Bill of Rights or laws of this territory, is hereby adopted, and shall be the rule of decision in all the courts of this territory." We assume that this section, however it may affect the case at bar, was within the power of the legislature to enact. United States *v.* Rio Grande Dam and Irrig. Co., 174 U. S. 690, 702, 703, 19 Sup. Ct. 700, 43 L. ed. 1136, 1141, 1142; Gutierres *v.* Albuquerque Land and Irrig. Co., supra; Act of June 17, 1902, ch. 1093, sec. 8; 32 Stat. at L. 390, U. S. Comp. Stat. Supp. 1907, p. 515. But we agree with the territorial court that, construed with the rest of the code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames.

In the first place, this is merely the adoption of a general system as against another general system (the Spanish-Mexican) that had been in force and that was repealed by sec. 1. If there were nothing more in the Code, it would be going a great way to say that such a broad phrase forbade the courts to hold that the common law was adaptable, and established the English rule of riparian rights only for English conditions, as suggested by Nave, J., below. It

might be argued, with force, that an amendment inserting the words, "So far only as is consistent with and adapted to the natural and physical condition of the territory, and the necessities of the people thereof," merely expressed what was implied before. Rev. Stat. 1887, sec. 2935. And the like might be urged with regard to sec. 3198 of the Revised Statutes of 1887, which, in terms, enacted or declared that "the common-law doctrine of riparian water rights" should not obtain. But we are not left to rely upon reasonable implications and argument, for other parts of the original Code are express upon the point. Therefore we need not consider whether, in any event, the statute could be supposed to confer property rights not previously possessed and not subject to legislative change. Compare Wisconsin & M. R. Co. *v.* Powers, 191 U. S. 379, 387, 24 Sup. Ct. 107, 48 L. ed. 229, 231, and Damon *v.* Hawaii, 194 U. S. 154, 160, 24 Sup. Ct. 617, 48 L. ed. 916, 917.

By the statutory Bill of Rights, art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall have the right to appropriate them exclusively except under such equitable regulations as the legislature shall provide. And then chapter 55, "Of Acequias or Irrigating Canals," after again declaring streams of running water public, sec. 1, enacts that "all the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water," sec. 3. By sec. 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. sec. 4. Preference is given to irrigation over other uses. sec. 5. By sec. 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken for mining. By sec. 17 precedence is given in time of scarcity to the oldest titles, and by sec. 25, "the regulations of acequias which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona shall remain as they were made and used up to this day;" and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and the qualifications imposed upon it, were correct. They simply follow what has been understood to be the law for many years. Clough *v.* Wing, 2 Ariz. 371.

The right to use water is not confined to riparian proprietors. Gutierres *v.* Albuquerque Land and Irrig. Co., 188 U. S. 545, 556, 23 Sup. Ct. 338, 47 L. ed. 588, 593; Coffin *v.* Left Hand Ditch Co., 6 Colo. 443, 449, 450; Willey *v.* Decker, 11 Wyo. 496, 100 Am. St. 939. Such a limitation would substitute accident for a rule based

upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land. Whether there are any limits of distance is a question not arising in this case.

A final objection urged is that the plaintiff's land is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed if he desires by chap. 55, sec. 4, now Rev. Stat. sec. 3202, as we have mentioned. We think that it would be unjust to disturb the decree on this ground, although in other circumstances the objection might be grave.

Decree affirmed.

HARGRAVE ET AL. *v.* COOK ET AL.

1895. SUPREME COURT OF CALIFORNIA

108 *Cal.* 72, 41 *Pac.* 18, 30 *L. R. A.* 390

HENSHAW, J.: Appeal from the order granting a new trial. Plaintiffs claim ownership in common with some of the named defendants in a certain described ditch, flume, water right, and right of way, by means of which they diverted the waters of Piru river to their nonriparian lands. The ditch was known as the "Hargrave and Comfort Ditch." They averred the adverse claims of defendants, and asked for a decree settling their rights and enjoining defendants from further assertion of such or any claims. The defendants answered in accordance with their various claims; some asserting ownership in the ditch and water rights, other declaring upon superior rights by prescription. But in particular the defendant Cook claimed the rights of a riparian owner to the water of the creek, which rights are pleaded as superior to those of the ditch owners.

Stripped of matters unnecessary to this consideration, the following are the essential facts: Defendant Cook is the owner of the Temescal rancho under United States patent issued in 1871. Piru river flows through this ranch, and thence across the northwest quarter of section 20. About the year 1875, section 20 being public land of the United States, plaintiffs' predecessors in interest constructed the ditch, and diverted part of the waters of the river, with the acquiescence of the then occupant of the land; and, as the court found, plaintiffs and their grantors, "for more than fourteen years next preceding the commencement of this suit, have been in the quiet, peaceable, open, adverse, notorious, uninterrupted, and exclusive possession, claiming right and title of said water ditch, with

the right to divert and use the waters of said Piru river to the extent of 271 inches, measured under four-inch pressure." The court further found that the predecessors in interest of the defendant Cook in the Temescal rancho did not use any of the waters of said stream except at rare and irregular intervals, and in small quantities; and that they at all times knew that the said Hargrave and Comfort ditch was being continuously used, and that the waters of the stream were being diverted and conducted to lands not riparian to the stream; and that such use, "with their full knowledge and acquiescence," had been continuous for a period exceeding ten years before Cook acquired title to the Temescal rancho and the northwest quarter of section 20. Also it is found that when Cook acquired title he knew of the use of the water by defendants, and "did not object to such use, but fully acquiesced therein, until about the commencement of this suit; and that the rights of plaintiffs were not disputed until long after they had fully acquired a prescriptive right with their co-owners to a part of the waters of the said stream." The waters of Piru river had in the past been little used by the owners of the Temescal rancho, but upon Cook's acquisition of it he began the planting of extensive orchards of fruit-bearing trees, until, as he pleads, there were at the commencement of the suit over two millions of orchard and nursery trees dependent upon the waters of the Piru river for irrigation. This use of the water by Cook naturally lessened the flow of the stream to plaintiffs' ditch, decreased the supply available for their purposes, and led to this action. The Piru Water Company, another of the defendants, took water from the Piru river by means of a ditch higher up the stream than the ditch of plaintiffs. Its ditch, at the time of the action, tapped the stream upon the land of the Temescal rancho, and carried the water over and across it to other nonriparian lands. Its right by prescription was claimed to be prior and superior to the right of the owners of the Hargrave and Comfort ditch, and this seems to have been conceded; though the precise extent of the right is a matter of controversy which will be considered hereafter.

The court, by its judgment and decree, awarded: (1) The right to Cook to use the waters flowing over the Temescal rancho for domestic uses and purposes and the watering of stock; (2) the right to Cook to 100 inches of water, under four-inch pressure, drawn off in the Esperanza ditch; (3) the right to the Piru Water Company to an amount not in excess of 285 inches, or so much thereof as may be necessary for the uses accustomed to be made upon certain nonriparian lands; (4) the right to the owners of the Hargrave and Comfort ditch to an amount not in excess of 271 inches, or so much thereof as may be necessary for the uses accustomed to be made, and in accordance with the amounts by the owners respectively accustomed to be used, upon certain described nonriparian lands; and (5) the right to Cook, "after the wants and necessities of the above prior owners have been fully and reasonably sup-

plied," to use the surplus waters for irrigation on the lands of this ranch. By this decree the right of an upper riparian owner to the use of the water for irrigating purposes is made subordinate to the right of a lower appropriator, because at the time the right of appropriation vested the riparian owner was not actually using the water for the designated purpose. This view, appellants contend, is sound. It is the view taken by the court upon trial and expressed by the judge in the following language: "I think the law is well settled in this state that a person diverting and appropriating to a useful purpose the waters of a running stream may acquire an ownership in the right to the use of such waters to the amount he has appropriated to such useful purpose, by operation of the statute of limitation, even against an upper riparian owner, although the point of diversion is without the limits of the lands of such riparian owner, except as against any lawful use to which the riparian owner had or was making of the waters during the time of the creation of the right in the appropriator by operation of statute of limitation." Upon the hearing of the motion for a new trial the court receded from this position, after the consideration of authorities not before called to its attention, and ordered a new trial. Other grounds were urged in support of the motion. Such of them as are deemed necessary will receive attention, but the principal point inviting consideration is the one above set forth.

The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right,—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow onto and along and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors. But none of his rights to put the water to legitimate uses is lost by mere nonuser. His rights are not easements, nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil, and pass with it, Lux *v.* Haggin, 69 Cal. 255, and may be lost only by grant, condemnation, or prescription. With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in, and no longer any rights to it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He can not complain of the mere facts of the

diversion of the water-course either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel." Lux *v.* Haggin, supra. The Rancho Temescal was never public land, within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1422 of the Civil Code. One who bases his right solely upon appropriation made of waters over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream, which, at the time of the appropriation, were held in private ownership.

The "acquiescence" of Cook and his predecessors in interest in the acts of the owners of the Hargrave & Comfort ditch, as declared by the findings, receives this support from the evidence, and no more: With knowledge of these acts, they never attempted to interfere with them. But before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it. Thus, in Hansen *v.* McCue, 42 Cal. 303, the waters of a spring had been appropriated below by plaintiff. The time arrived when defendant, upon whose land the spring was situated, desired to make use of the waters which fed it. A prescriptive right in plaintiff was urged by reason of defendant's long acquiescence in the use, but this court said: "It will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hansen lot. If they had no right to complain in the first instance, we are not driven to the presumption of the grant of an easement to account for why they did not complain." The same principle is announced in Ditch Co. *v.* Crane, 80 Cal. 181, where a lower appropriator claimed a right to a certain amount of water against an appropriator whose ditch was higher up the stream. The finding was that plaintiff diverted his ditch full of water "whenever there was water in the stream to fill it," and a right superior and adverse to that of defendant was predicated upon this. But the court said: "If the plaintiff's ditch was simply diverting water which defendants allowed to pass down the stream while the headgate of their ditch was closed, the act of plaintiff in diverting the water thus permitted to pass down could not, in the nature of things, be adverse

to the defendants. The latter could not complain, and title by prescription can not be acquired unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom the acts are performed." To like effect are the cases of Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 192, and Water Co. *v.* Hancock, 85 Cal. 219. No estoppel is pleaded or found, nor would the facts warrant such a finding. The motion for a new trial was properly granted upon the ground considered.

In contemplation of the new trial it is proper to say that the rights of defendant Cook, and of defendant the Piru Water Company, of which Cook is a stockholder, are in issue in this action only to the extent that their rights affect or are affected by the rights of the plaintiffs. As between themselves, their rights are not subject here to determination, excepting so far as may be necessary to do complete justice to plaintiffs, and excepting so far, as between themselves, they have tendered and joined hostile issues. The limitation upon the use of the water appropriated by the Piru Water Company is not warranted by the evidence. So far as plaintiffs are concerned, the Piru Water Company is prior in time and superior in location, and had acquired the ownership of a given amount of water while that water was used for proper objects, with the right to change the place and purpose of use so long as the change did not injuriously affect the rights of the subsequent appropriators and claimants. Ramelli *v.* Irish, 96 Cal. 214; Jacob *v.* Lorenz, 98 Cal. 332; Davis *v.* Gale, 32 Cal. 26; Pom. Water Rights, sec. 69.

Upon the question of the right of the owners of the Hargrave and Comfort ditch to extend it five or six hundred feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States, 14 Stat. 253; 16 Stat. 218, and while in the exercise of these rights he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to take the amount of water to which he has ownership, but then only when "others are not injured by the change." Civ. Code, sec. 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement; and even when entering upon this he is bound only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. Gale and W. Easem. 235. As to lands other than those subject to his easement, and as

to other claimants and owners, he can make no change at all which injuriously affects them or their rights. The order appealed from is affirmed.

We concur: Temple, J.; McFarland, J.[58]

[58] See Dontanello *v.* Gust (Wash.), 150 Pac. 420; Oregon Construction Co. *v.* Allen Ditch Co., 41 Ore. 209, 69 Pac. 455; Heilbron *v.* Last Chance Water Ditch Co., 75 Cal. 117, 17 Pac. 65.

The California act regulating the appropriation and use of water, approved June 16, 1913, and approved by the people, on referendum, Nov. 3, 1914, includes the following provisions:

Sec. 11. All water or the use of water which has never been appropriated, or which has been heretofore appropriated and which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, or which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which may hereafter be appropriated and cease to be put, to the useful or beneficial purpose for which it was appropriated, or which in the future may be appropriated and not be, in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, is hereby declared to be unappropriated. And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so non-applied, unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act. * * *

Sec. 42. The word "water" in this act shall be construed as embracing the term "or use of water"; and the term "or use of water" in this act shall be construed as embracing the word "water." Whenever the terms stream, stream system, lake or other body of water or water occurs in this act, such term shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels. But nothing in this act shall be construed as giving or confirming any right, or title, or interest to or in the corpus of any water; provided, that the term "useful or beneficial purposes" as used in this act shall not be construed to mean the use in any one year of more than two and one half acre feet of water per acre in the irrigation of uncultivated areas of land not devoted to cultivated crops.—Henning's Gen. Laws of Cal., 1914, pp. 2172, 2183.

SOUTHERN CALIFORNIA INVESTMENT COMPANY *v.* WILSHIRE ET AL.

1904 SUPREME COURT OF CALIFORNIA

144 *Cal.* 68, 77 *Pac.* 767

SHAW, J.: The complaint states a cause of action to quiet the alleged title of plaintiff to the use of all the waters of a certain stream in San Bernardino county, known as "Edgar Creek." The answer denies plaintiff's title, and sets forth the title of defendants. The plaintiff appeals from the judgment, and from an order denying its motion for a new trial.

* * * * * * *

We are of the opinion that the judgment, in certain particulars, is not supported by the findings, and that it must, in consequence thereof, be modified.

The prayer of the complaint is that all the adverse claims of the defendants, or either of them, to the water, be determined, and that they, and each of them, be enjoined from asserting any claim to any part of the waters of the stream adverse to the plaintiff. The defendants allege that they and their predecessors in interest are, and for years have been, the owners of a large body of land situate upon the creek, some three or four miles above the land of the plaintiff; that they have the right to use the water thereon as riparian proprietors, by reason of the fact that the creek flows through the land described; and that they have the further right to the use of all of said water flowing through their land for irrigation, domestic use, and the watering of stock upon the said lands by virtue of an appropriation and continuous adverse use thereunder. The complaint does not state the nature of the plaintiff's right to the water—whether by virtue of a riparian right or a prescriptive right. Upon the issues thus presented, it was the duty of the court to determine, and in its judgment declare, the extent of the right of the defendants, as well as that of the plaintiff.

The court finds that the plaintiff was also the owner of some 320 acres of land situated upon the creek, and, with respect to the riparian rights in the water, it finds that both the plaintiff and the defendants have the right to use the waters of the stream as riparian proprietors, in proportion to the respective ownership of lands on the stream owned by them, respectively, in common with the other owners of land situated along the stream, having similar rights, but that these riparian rights, both of the plaintiff and defendant, are subject to the prescriptive rights in the water found to be owned by the plaintiff and defendants, respectively. It further finds that the plaintiff is the owner and entitled to the use of all that portion of the flow of the creek, and of the waters thereof rising and customarily

flowing in the creek, after the defendants' rights to said stream have been fully satisfied, and not otherwise. This finding, we understand, refers to the plaintiff's right by virtue of appropriation and prescription. With respect to the prescriptive right of the defendants, the court finds that the defendants are the owners of the right to the use of all the surface water of the creek flowing at the upper boundary of their land, for the purpose of irrigation and domestic use upon said land. The judgment declares that plaintiff and defendants are riparian proprietors upon the stream, and have, respectively, the right to use the water of the stream "proportionately to the frontage of their lands upon the said stream, considered with regard to the whole frontage of land upon said stream;" that the defendants are the owners and entitled to the full, free, and uninterrupted use and enjoyment of all the surface waters of the creek flowing at their point of diversion near the north line of their lands; that the plaintiff is entitled to all the waters of the stream customarily flowing in the stream at its dam, a short distance above its land, where the ditch begins by which it acquired the prescriptive right referred to in the findings; and that all the rights of the plaintiff in the waters of the stream are subject and subordinate to the prescriptive rights therein adjudged to be owned by the defendants.

* * * * * * *

Upon the findings with respect to the water right of the defendants, the court should not have adjudged that the defendants were the absolute and unqualified owners of the right to divert and use all the surface waters of the stream. The owner of a prescriptive right to the waters of a stream has not the unconditional right to change the place of its use at his pleasure. The right to change the place of use is subject to the qualification that, where there are other persons having subordinate rights to the waters of the stream, the right to change the place of use can only be exercised when and to the extent that such change will not injure the subordinate right. Kidd *v.* Laird, 15 Cal. 181, 76 Am. Dec. 472; Butte T. M. Co. *v.* Morgan, 19 Cal. 616; Ramelli *v.* Irish, 96 Cal. 217; Hargrave *v.* Cook, 108 Cal. 80, 30 L. R. A. 390; North Fork Company *v.* Edwards, 121 Cal. 666; Last Chance M. Co. *v.* Bunker Hill M. Co., 49 Fed. 430; Black's Pomeroy on Water Rights, sec. 69. That portion of the judgment which purports to vest in the defendants the absolute right to divert the water is erroneous, in that it does not limit such right to the use of the water on the land for the benefit of which it was acquired. When the title to water is acquired by adverse use, the extent of the right is limited by the extent of the use which conferred the title. The findings limit this right, as it should be limited; but the judgment goes further, and gives an absolute right, the effect of which is that the defendants would have the right to take out the water, and make such use of it as they see fit,

either on the lands within the watershed for the benefit of which it was appropriated, or upon other lands, or for some use beyond and outside of the watershed. The action was begun in September, 1888. The trial began in June, 1889, but, after the greater part of the evidence was taken, for some reason not appearing, the trial was continued from year to year until June, 1901, when some additional evidence was taken, and thereupon the findings and judgment were made and rendered. From the evidence taken in 1901, it appears that in 1899, long after the action was begun, one of the defendants, who owned the right to use one-third of the water on a certain portion of the lands described in the answer, attempted to sell his water right to the city of Redlands, and that in pursuance thereof the water which he had theretofore been accustomed to use upon the lands within the watershed had been taken through a pipe, over the divide and beyond the watershed of the creek, some ten or fifteen miles, to the city of Redlands, and was there used by the city. This, perhaps, accounts for the form of the judgment, which, if allowed to stand, would secure to the defendants the right to make this disposition of the water. The court finds that, notwithstanding the diversion of all the water of the creek by the defendants at their point of diversion, and its use upon their land for irrigation, a certain percentage thereof seeped into the soil, and percolated through the same until it again reached the stream, and that a portion of this water thus seeping into the soil reached the point of diversion of the plaintiff. From the nature of the soil, and the heavy grade of the lands, it is manifest that this would be the case. The court further finds that, without the addition to the stream thus caused by the seepage of water used by the defendants, there had always been, from other additions and seepages, sufficient water flowing in the stream at the plaintiff's point of diversion to irrigate all the lands actually cultivated by the plaintiff and its predecessors, which the evidence shows was about twenty-five acres. From this it would appear that the diversion of the water taken by the plaintiff, and the carrying of it beyond the watershed, would not injure the prescriptive right of the plaintiff. If no other rights were involved, the change of the place of use would be without injury. But the plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through his lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received. As such riparian owner, it has the right to have the stream continue to flow through its land in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel of its land—and whether it is or is not as valuable, in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place,

it can not be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendant will deprive it of a right of property—a valuable part of its estate. Moore *v.* Clear Lake W. W., 68 Cal. 146; Stanford *v.* Felt, 71 Cal 249; Heilbron *v.* Fowler S. C. Co., 75 Cal. 426, 7 Am. St. 183; Conkling *v.* Pacific I. Co., 87 Cal. 296; Walker *v.* Emerson, 89 Cal. 456; Spargur *v.* Heard, 90 Cal. 221. The taking of the water beyond the watershed would therefore be an injury to the plaintiff's riparian right, which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined. The judgment should enjoin the defendants from using the water otherwise than as the court finds and rightfully adjudges that they are entitled to such use. They were not entitled to the use of the water, except upon the lands described in the answer. The judgment should therefore be modified so as to properly describe the respective rights of the parties as riparian owners, and so as to enjoin the defendants from using the water of the creek except upon the lands of the defendants described in the answer, and for the purposes of irrigation and domestic use thereon.

The other alleged errors do not require extended notice. The fact that, during the time the defendants were using the water adversely to the plaintiff, the defendants' lands upon which they were using the water were vacant government lands, did not make their use less adverse, nor prevent them from acquiring a right thereby. Any lawful use at any place would be sufficient for that purpose, regardless of the title of the defendants to the land on which it was used.

The nature of the plaintiff's title—whether by United States patent or otherwise—is also immaterial. One person may by adverse use divest the title of another, regardless of the source of that title.

In view of the nature of the evidence, we do not perceive how the court could have ascertained and declared the exact amount of water which each party was entitled to use by virtue of their respective riparian rights. The conditions upon which such proportional rights depend do not appear.

It is ordered that the judgment of the superior court be modified so that the first paragraph thereof after the preamble shall read as follows:

"Now, therefore, it is ordered, adjudged and decreed that the defendants herein except the defendant Edward Wilshire, who has heretofore filed a disclaimer in this cause, are the owners and entitled to the possession, and full, free, and uninterrupted use and enjoyment of all the surface waters of Little San Gorgonio creek, sometimes known as 'Edgar Creek' and sometimes known as 'Weaver Creek,' now flowing or accustomed to flow at or above the points of diversion on said stream, now or heretofore made by said defendants, as indicated in findings fourteen and

twenty-one herein, for the purpose of using the same for irrigation and domestic use upon the lands belonging to the defendants, respectively, and described in their answers on file herein, and that the said defendants, and each of them, be enjoined from at any time making any use of said waters elsewhere."

And that the second paragraph of said judgment, immediately following the above, be modified, so as to read as follows:

"That said defendants, and each of them, and said plaintiff, are riparian proprietors upon said stream, and that, as such riparian proprietors, they each have the right, respectively, to the reasonable use of the waters of said stream, each considered with regard to the rights and necessities of the other, and of other owners of land fronting upon said stream; the plaintiff's riparian right, however, being subject to the diversion by said defendants of all the surface waters of said stream customarily flowing in the irrigating season of each year at the points indicated by conclusion of law No. 1 herein, which said right of appropriation to all the surface waters of said stream so flowing is a prior and superior right to said waters to plaintiff's riparian right, or to any right of plaintiff to the waters of said stream, where the same flow through the lands of defendants at or above the points of diversion indicated by conclusion of law No. 1 herein."

The judgment as so modified, and the order denying the motion for a new trial, are affirmed.[59]

We concur: Angellotti, J.; Van Dyke, J.

CALIFORNIA PASTORAL AND AGRICULTURAL CO., LIMITED, ET AL. *v.* MADERA CANAL AND IRRIGATION CO.

1914. SUPREME COURT OF CALIFORNIA.

167 Cal. 78, 138 Pac. 718

ANGELOTTI, J.: This is an appeal by plaintiffs from a judgment and order denying a new trial, in an action brought by them to obtain a judgment determining the right of defendant, if any, to divert waters from the Fresno river at points above the lands of plaintiffs, which are riparian to said river, and enjoining the diversion of any greater amount than that determined by such judgment to belong to defendant.

The defendant is a corporation incorporated about December 8, 1888, and ever since its incorporation it has been continuously engaged in the business, for which it was organized, "of acquiring, disposing of, appropriating and diverting water and water rights

[59] See Perry *v.* Calkins, 159 Cal. 175, 113 Pac. 136.

and selling, renting and distributing water and the use of water to landowners for the irrigation of land." For many years defendant has been diverting water from Fresno river at a point above plaintiffs' land, and, by means of a system of canals, has disposed of the same for the irrigation of lands not riparian to said river; no part of the water so diverted ever being returned to the channel of the river. No question is here raised as to the right of defendant to so divert 100 cubic feet of water flowing per second. As to all above this amount, the record establishes that whatever right defendant possesses has been acquired solely by prescription, and that plaintiffs have the right as against defendant to the flow of the entire stream, subject to such prescriptive right of defendant. The amended answer of defendant fully sets up facts claiming the acquirement of such right by it "to the extent of 400 cubic feet of water flowing per second, when water to that extent was flowing in said river, and at all other times all of the waters flowing therein." It is established by the record that all of the water actually diverted has been disposed of by defendant solely for the purpose of irrigation of lands, and that said appropriation and distribution has at all times been and now is a "public use." By the amended complaint it was alleged that 100 cubic feet of water flowing per second is all the water which was or is reasonably required for the irrigation of all of the lands irrigated from or under defendant's canals.

The trial court found that for more than twenty-five years defendant had been diverting from the Fresno river water to the extent of 250 cubic feet flow per second, when there was sufficient water in the river to furnish that amount, and, when less, all of the water flowing therein, distributing, renting, selling and using the same for the purpose of irrigation. It further found in regard to such diversion the existence of all the facts essential to give defendant a title by prescription as against plaintiffs to the extent specified, viz., 250 cubic feet flow per second, including in its findings on this matter one stating that defendant and its predecessors had actually and continuously "distributed and used all of said waters so diverted and appropriated as aforesaid to useful and beneficial purposes, to wit, to the irrigation of lands lying under the flow of its system of canals and ditches; and that all of the waters so diverted by defendant, its grantors and predecessors in interest, as aforesaid, from all sources during all of said period have been at all of said times and are beneficially used in the irrigation of said lands, and have benefited said land." But the court found further as follows, viz.: "That less than two hundred and fifty (250) cubic feet of water continuously running and flowing per second during the irrigation season would be sufficient to irrigate the lands which have been during said period irrigated by the defendant, but how much less the court is unable to determine from the evidence, but that all of said waters so taken, appropriated and diverted by the defendant as aforesaid, its grantors and predecessors in interest, have been actually used in and applied

to the irrigation of lands, and the said use thereof has been beneficial, and that the defendant was so doing at the commencement of this action and still continues so to do."

Judgment was given declaring that defendant is the owner and entitled to divert, take and appropriate from the said Fresno river, at a specified point, water to the extent of 250 cubic feet running and flowing per second, whenever there is sufficient water to furnish said amount, and when the water flowing in said river is insufficient to furnish that amount, all of the waters running and flowing in said river at said point.

Upon the question as to the amount of water reasonably necessary to be diverted from the river for the proper irrigation of the lands irrigated by defendant by means of its system, the best that can be said for defendant's case is that there is a conflict in the evidence. Certainly there is much evidence tending to the conclusion that much less than the amount found to have been diverted would have been all that was reasonably necessary for the irrigation of the lands that were supplied by defendant with water for irrigating purposes. If it be the law, as claimed by appellant, that one actually diverting water can acquire by prescription as against a riparian owner the right to take only so much water as is reasonably necessary for the beneficial use for which the diversion is made, regardless of the amount actually taken and applied to such use, it appears to us to necessarily follow either that there is no finding upon the material issue made by the pleadings as to the amount reasonably required or reasonably necessary for the irrigation of the lands irrigated from or under defendant's canals, or that the portion of the findings that we have last quoted must be taken as a finding in favor of plaintiffs upon this material issue, to the effect that the amount actually diverted and in fact actually applied to the irrigation of said lands, viz., 250 cubic feet flow per second, when there was sufficient water in the river to furnish that amount, and all the water therein when the flow was less than 250 cubic feet per second. although beneficial, has not been reasonably necessary for that purpose. Considering all the findings together, it is clear to us that the statements to the effect that all of the water diverted has been used in the irrigation of said lands, and that such use has been beneficial to said lands, were not intended as being equivalent to a finding that it has all been reasonably necessary for the proper irrigation of the same, and can not be so construed. While the written opinion filed by the learned trial judge in deciding this case can not properly be considered in determining the construction to be given to the findings in this behalf, we think certain language used therein so aptly states the situation shown by the findings themselves that we quote it. It is as follows: "In my opinion, the evidence in this case shows that the defendant during the five years before suit has used all the water in its canal in irrigating land. It might, during that period, have

used less than it did, and still the irrigation might have been sufficient. A man may eat three meals a day, and yet be able to live comfortably with only two. But, so far as the evidence shows, no water has been wasted, in any other sense than that more was applied than was reasonably necessary for irrigating the land that was irrigated. The precise question, therefore, is whether, as against a riparian owner, an appropriator of water can acquire title by prescription to the use, for the purpose of irrigation, of any greater quantity than was reasonably necessary for that purpose." It is clear enough from the findings that the learned trial judge determined that question in the affirmative, and, for that reason, deemed it unnecessary to make a finding on the question of the amount of water reasonably necessary for the irrigation of the land under defendant's canals, deeming that question immaterial. Apparently the findings were prepared as they are with the very purpose on his part to make them present on appeal the particular question stated by him in his opinion to be the precise question involved.

The learned judge of the trial court substantially declared in his opinion that it is undoubtedly the law as between appropriators that, if one has used more water than was reasonably necessary for the purposes to which it was applied, such excess was mere waste, to the use of which a title by prescription could not be acquired. He, however, concluded that the rule is not the same between an appropriator and riparian owners. There can be no question of the correctness of his view of the law as between appropriators. It is now well settled that an appropriator is not entitled to the quantity of water actually diverted and taken into possession, if he uses only a portion of it, and that his right is limited to the amount he actually uses for a beneficial purpose, not exceeding the carrying capacity of his ditch or canal. See Wiel on Water Rights, secs. 478 and 479: "An appropriation of water by the owner of lands by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not exceeding the capacity of the ditch, as the appropriator may put to a useful purpose," Smith *v.* Hawkins, 120 Cal. 88, "not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient to thoroughly and properly irrigate a thousand acres of land, but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land." Leavitt *v.* Lassen Irr. Co., 157 Cal. 86, 29 L. R. A. (N. S.) 213. See, also, Senior *v.* Anderson, 115 Cal. 496, 130 Cal. 290; Southside Imp. Co. *v.* Burson, 147 Cal. 407; Thayer *v.* California Development Co., 164 Cal. 117. In Senior *v.* Anderson, 115 Cal. 496, it was squarely held that a diversion by an appropriator for any length of time would not give any right to him as against a subsequent appropriator, and that the applica-

tion of the water to a beneficial purpose must mark the beginning of any adverse use. In section 586 of Wiel on Water Rights it is declared as follows: "To give color of title the adverse claimant may have begun his use in any character whatever, but if he began it in the character of an appropriator, pretending to have a valid appropriation, he must have made his adverse use a use for a beneficial purpose. Since a right of appropriation can not be held without beneficial use, one pretending to be an appropriator has no color of title without beneficial use. It is consequently held that the adverse use must be for a beneficial purpose; though the beneficial use need not be made immediately, a reasonable time being allowed, as in making the appropriation. Rental and sale is a beneficial use." This statement is fully supported by the authorities cited by the author.

It is further substantially declared, wherever the question has been considered, that beneficial use is not what is actually consumed, but what is reasonably necessary for the purpose to which the water is devoted, and that an excessive diversion of water for any purpose can not be regarded as a diversion for a beneficial use, in so far as it is in excess of any reasonable requirement for that purpose. It has been said by the Supreme Court of Idaho that "the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it," and that "the inquiry was, therefore, not what he had used, but how much was actually necessary." See Farmers, etc., Co. *v.* Riverside Irr. Dist., 16 Idaho 535, and cases there cited. There, as here (Civ. Code, sec. 1411) the statute prescribed that the appropriation must be for some useful or beneficial purpose, and that, when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. It was declared in the case last cited that it was the policy of the law of the state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes. Such is clearly the policy of the law of this state. An examination of the authorities shows that the tendency of the decisions is to hold that any actual use in excess of reasonable requirement is waste (see Wiel on Water Rights, sec. 481), and that the excess can not be held to have been applied to a beneficial or useful purpose. In Senior *v.* Anderson, supra, where it was contended that the plaintiffs' right to any of the water actually diverted was barred by the statute of limitations, the plaintiffs being subsequent appropriators below the point of diversion of defendants, it was held that a diversion "of water, not necessary for a useful purpose, for any length of time, would not give a right as against the plaintiffs."

The effect of the decisions clearly appears to be that one actually diverting water under a claim of appropriation for a useful or beneficial purpose can not by such diversion acquire any right

to divert more water than is reasonably necessary for such use or purpose, no matter how long a diversion in excess thereof has continued, and that there is no such thing as the acquirement by such an appropriator of a title by prescription, in so far as the excessive diversion is concerned.

While it may never have been expressly held in this state, in a case where the question was directly involved, that this doctrine may be invoked in favor of a riparian owner, it has been so stated. In stating the elements essential to the acquirement of title by prescription by an appropriator as against riparian proprietors, this court, in Alta Land, etc., Co. v. Hancock, 85 Cal. 219, 20 Am. St. 217, included "actual and uninterrupted user * * * for a useful purpose." This statement was quoted with approval by the Supreme Court of Oregon in Oregon, etc., Co. *v.* Allen, 41 Ore. 209, 93 Am. St. 701. The same thing is strongly implied by the language used in our opinions in Senior *v.* Anderson, supra, and in Barrows *v.* Fox, 98 Cal. 63.

We have already quoted from sec. 586 of Wiel on Water Rights, in so far as it is material to this question. We are of the opinion that the doctrine should be held applicable in favor of a riparian owner. The state has limited the right to appropriate the waters of a stream to such waters as are reasonably necessary for the purpose for which the water is in fact appropriated. In so far as the diversion exceeds such reasonably necessary amount, it is contrary to the policy of our law and unauthorized. It is "a taking without right." Thayer *v.* California Development Co., supra, and can confer no right, no matter for how long continued. In so far as it is not in excess of such amount, it is a diversion authorized and sanctioned so far as the state is concerned, and, if the diversion is continued for the requisite time under such circumstances as to give a title by prescription, it will extinguish pro tanto the riparian rights below. See Gallaher *v.* Montecito, etc., Water Co., 101 Cal. 242; Arroyo, etc., Co. *v.* Baldwin, 155 Cal. 280, 285. But we think it should be held to extinguish such rights only pro tanto.

As long as one is claiming solely as an appropriator, as was the defendant here, for there is no pretense that there was any other basis for its claim, it necessarily follows, in view of what we have said, that his claim of right can include only such water as is reasonably necessary for the purpose for which the diversion was made, and the water in fact used. Such is the full extent of his claim in view of the law relating to the appropriation of water. His "color of title," as Mr. Wiel puts it, extends to no other water, and one of the necessary elements of the adverse possession essential to a title by prescription is lacking as to all water diverted in excess of that reasonably necessary for the purpose for which the diversion is made. The riparian owner can not be held to have notice of any greater claim. The situation of the

riparian owner in such a case is not at all analogous to that of a riparian owner who has purported to grant to another his riparian right without granting the land of which that right is part and parcel. The effect of such a grant is simply to convey the grantor's right to the use of the water on his own riparian land, and to estop the grantor to complain against any use of the water which the grantee may make to the injury of such riparian right. See Duckworth *v.* Watsonville, etc., Co., 150 Cal. 526; St. Helena Water Co. *v.* Forbes, 62 Cal 182, 184, 45 Am. Rep. 659. Such estoppel is effective as to the whole riparian right of the grantor, simply because of the terms of his purported grant thereof. By reason of his voluntary act, he has waived for himself and his successors all claims based on the doctrine of riparian rights, and is in no position to complain of any invasion thereof by the grantee or his successors.

In the absence of acts constituting an estoppel upon the riparian owner, section 1411, Civil Code, is applicable in a controversy between one claiming by prescription solely as an appropriator and a riparian owner, because it defines the extent of the only possible claim of right on the part of the appropriator to the use of the water, and in effect limits that claim, as we have seen, to so much water as is reasonably necessary for the purpose for which the appropriation is made. It is the full measure fixed by the law for the very claim he is asserting against the whole world, which necessarily includes the riparian owner below him. To no greater extent, we think, can the diversion by such an appropriator be held to constitute such an invasion of the rights of the riparian owner as to enable him to acquire a title by prescription against such owner.

In determining how much of the water in fact used had been reasonably necessary for the purpose for which it was used, we believe that a court should be liberal with the appropriator to the extent at least that it should not deprive him of any portion of the amount of water that he had, in fact, used for the period necessary to gain title by prescription, unless it is clearly and satisfactorily made to appear that he has used more than was reasonably necessary. The presumption would appear to be in his favor, for ordinarily one would not take the pains to use upon any land more than was reasonably necessary under all the circumstances. But we are of the opinion that the findings in this case have designedly been made to present the question of the use by defendant of water not reasonably necessary for the purposes for which it has been used, such a use as, in our view of the law, amounts to waste.

We do not desire to be understood as questioning in the slightest degree the well-settled rule that the diverter, to use language contained in appellant's closing brief, whether designing to use the water himself or to furnish it to others, has a reasonable time, the situation and circumstances considered, within which to

apply it to a beneficial use. This rule is, of course, peculiarly applicable to a person or corporation diverting water for the purposes of rental and sale to a specified district or neighborhood. But that rule does not appear to be at all pertinent on this appeal.

Whatever right the defendant has acquired by prescription to divert the waters of the Fresno river is confined to such amount as is reasonably necessary for the lands for which the appropriation has been made. As said in an opinion of the United States Circuit Court in the recent case of San Joaquin and Kings River, etc., Co. v. County of Stanislaus, 191 Fed. 875, it is "based upon and is measured and limited by the beneficial use of certain consumers for which the water is being appropriated;" such beneficial use including only such water as is required for the purpose for which it is used.

Learned counsel for respondent apparently seek to distinguish this case from one where the diversion of water is made by an owner of land for the purpose of irrigating his land, upon the ground that here the diversion was by a public service corporation for the purpose of distribution and sale to others for the irrigation of their lands. The claim appears to be, if we correctly understand the brief on this point, that, as to such a company, the statute of limitations runs against riparian owners as to all the water actually diverted and conducted to the place of intended use with a present bona fide intention of distribution and selling the same to all owners of land susceptible of irrigation from its system, although none or only a part of the same is ever actually applied to the beneficial use of irrigation of lands. It is to be borne in mind that the appropriation here was for distribution and sale to owners of land to be used by them for the irrigation of their land, the lands to be irrigated being, of course, such lands as were susceptible of irrigation under defendant's system. As we have stated, we do not understand that any question of the effect of the rule that the appropriator has a reasonable time, the situation and circumstances considered, within which to apply the water to a beneficial use is presented by the findings in this case. Disregarding such considerations as may be based on that rule, we are unable to see, upon the case made by the findings, any distinction, in law or in fact, material to the question before us, between one diverting water for use on his land, and one diverting it for purposes of rental or sale to others for the irrigation of such of their land as is susceptible of irrigation under his system.

While it is true that water may be appropriated for sale, rental, or distribution, and while it has been said that a use "for the purposes of rental and sale of the water * * * is beneficial under the very terms of the Constitution itself," this does not mean that the mere fact that the declared purpose of the attempted appropriation is sale, rental, and distribution warrants the appropriation of more water than is reasonably necessary for the proper

demands of those for whose ultimate use it is appropriated. For instance, if the appropriation be for the purpose of the sale and distribution of water to the owners of land in a district comprising, say, 20,000 acres, for the irrigation of said lands, a taking of twice the amount of water reasonably necessary for the irrigation of all of said land would not appear to be warranted any more in the case of the appropriator for sale and distribution than it would be if all of said owners had united in an attempted appropriation of the same. The ultimate beneficial use in each case is the same, the irrigation of such lands and the interposition of an agency such as a corporation formed for the purpose of appropriating and distributing for a compensation the water for such beneficial use should not make any difference in the respect suggested. In neither case should there be held to be warrant for the taking of more water than is reasonably necessary for the ultimate use for which the appropriation is made, viz., the irrigation of such body of lands. This would appear to be very plain as to a case such as we have suggested. And, as we look at it, such substantially is the case made by the findings before us. All of the water diverted and sold by defendant has not been reasonably necessary for the ultimate purpose for which it was appropriated, viz., the irrigation of the lands for the irrigation of which the water has been diverted. We are speaking of the case as it appears to us from the findings, and entirely without regard to the evidence. We are also speaking entirely without regard to the question of what is a reasonable time within which such a corporation as the defendant may apply the water diverted to a beneficial use. It is conceded by counsel for plaintiffs that the water so being applied to a beneficial use within what is a reasonable time under all the circumstances, "title by prescription should date from the date of diversion."

We are of the opinion that, in the present condition of the findings, a finding on the question of the amount of water reasonably necessary for the irrigation of the lands supplied by defendant with water for irrigation was essential, and that, on account of the absence thereof, a reversal must be ordered.

The judgment and order appealed from are reversed.

CAVE ET AL. *v.* TYLER ET AL.

1901. SUPREME COURT OF CALIFORNIA

133 *Cal.* 566, 65 *Pac.* 1089

McFARLAND, J.: This is an action to quiet plaintiffs' title to the right to the use, and a diversion through a ditch called the "Mill Creek Zanje," of all the water of a natural stream called "Mill

Creek" and its tributaries. Judgment went for plaintiffs, and defendant Hannah S. Skinner appeals from an order denying her motion for a new trial. Under our views of the case it is not necessary to examine all of the questions presented, and the facts essential to the point of the decision may be briefly stated. Mountain Home creek is a tributary of Mill creek, and Snow creek is a tributary of Mountain Home creek. Appellant owns land through which the two latter streams run and which is riparian to the same. She acquired her right to this land in 1871 from the Southern Pacific Railroad Company, who acquired it in the same year from the United States government. Since 1888 she has used about fifteen inches of water from Mountain Home creek and about two inches from Snow creek for the necessary irrigation of her land, upon which she grows trees, vines and vegetables, and for domestic purposes; and this was not an unreasonable amount of water, as the court finds, for such purposes. At this point the land through which these streams run was part of the public domain of the United States. On Mill creek, about five miles below appellant's land, the respondents and their predecessors have by means of said Mill Creek Zanje continuously since about the year 1853 diverted all the water flowing in said Mill creek for irrigation and other purposes; and their diversion of the water has been open, notorious, and under a claim of right. They claim that by reason of such diversion they have the right to prevent appellant from using any of the water of the tributaries for her purposes as above stated, and the court so decreed.

Respondents do not claim any rights as riparian proprietors. It is not found that they own any land whatever on Mill creek. They claim solely as appropriators. Of course, under the general law, they acquired no rights by prescription as against appellant or her predecessors, who were upper riparian proprietors; for a diversion of the water after it had passed her land, which did not in any way interfere with its natural flow over her land, was not an invasion of her right which she was called upon to notice. Hargrave *v.* Cook, 108 Cal. 72; Bathgate *v.* Irvine, 126 Cal. 135. It is contended, however, that the right of respondents to continue to divert all of the water, and to prevent appellant from using any of it as a riparian owner, is guaranteed to them by section 9 of the Act of Congress of July 26, 1866, 14 Stat. 253, and section 17 of the act amendatory thereof passed July 9, 1870, 16 Stat. 218. We do not think that this contention can be maintained. There is no finding that the diversion was made on the public domain of the United States. There are some things in the record which seem to indicate that the diversion was on private land acquired under a Mexican grant in which the government never had any estate or interest; but there is no finding on the subject. The burden of showing that the diversion was made on the public domain was upon respondents, if that fact was essential to respondents' asserted right under said laws of congress, as we think it was. In City of Santa Cruz *v.* Enright, 95 Cal.

105, the defendant claimed as an appropriator of water, and the court said: "It is claimed that the court erred in instructing the jury that the defendant could not acquire any right in the waters of the creek by mere appropriation. This contention can not be sustained. Water Co. *v.* Hancock, 85 Cal. 222, 20 Am. St. 217. It does not appear whether the lands through which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact." In the case at bar, therefore, the respondents are not in the position of one who has invaded the public domain and attempted to acquire any possessory rights thereon.

The ninth section of the act of 1866 merely provides "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same," 14 Stat. 253; and the seventeenth section of the act of 1870 merely provides that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights * * * as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." It is clear that these provisions refer only to the interest of those who have gone upon the public domain and done acts of ownership there which the government, as proprietor, could have prevented, but in which it acquiesced. For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water rights, etc., according to such rules as could be made applicable to the peculiar situation; and, when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way, from 1849 to 1866, a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government. The acts of 1866 and 1870 were intended merely to expressly recognize and ratify this system. Where they speak of "vested and accrued" rights, they mean, of course, vested and accrued as between the locators; for mere general locators have no vested right as against the government. The government could have ousted these locators by legal proceedings, or, perhaps, by the direct exercise of sovereign force. But it did not do so. It acquiesced in their possession. And by the congressional acts above noted the government merely said that whenever it had acquiesced in asserted possessory rights on the public domain which were upheld by local customs and laws and decisions of the courts, as between the possessors themselves, it would treat those posses-

sors as though they had acquired prescriptive rights against the government, and would recognize such rights whenever afterwards granting patents to any part of its land. When a person went upon the public domain and there diverted the water of a stream running thereon, he invaded the rights of the government to its own land; and the government could either resist the invasion or acquiesce in it. If it adopted the latter course, then the kind of vested and accrued right grew up which the government by the said acts of congress promised to protect. But when a party on private land to which the government had no title diverts water from a stream, what vested right does he acquire in the water in the upper part of the stream where it flows through the government land? Such diversion does not interfere in any way with the flow of the stream in the land of the upper proprietor. It does him no injury. It is no invasion of his right. It gives him no cause of action. It leaves no field for the play of consent or acquiescence. It never ripens into title by prescription. Under what local custom or law, under what "decisions of the courts," was there "a vested and accrued" right of respondents to all the water of the stream up through the public domain to its source, thus draining a large section of country above of its source of fertility? We know of none. In all the cases to which we have been referred the diversion was upon the public domain. It may be well to say, although the case is not referred to in the briefs, that there is nothing in Healy *v.* Woodruff, 97 Cal. 464, at all conflicting with the views above expressed. It was merely held there that the plaintiff was not prevented from enlarging his ditch by the fact that since its original construction he had obtained title from the government to "a piece of land through a small portion of which the said Cedar creek [the stream diverted] runs." There was no contention that the diversion and the ditch were not on the public domain.

Under the above view it is not necessary to notice other points made by appellant. What the rights of the respondents would have been, if it had been shown that the diversion had been made on the public domain and acquiesced in by the government, need not here be considered. The order appealed from is reversed and a new trial ordered.

We concur: Henshaw, J.; Temple, J.

WILLIAMS ET AL. *v.* ALTNOW ET AL.

1908. SUPREME COURT OF OREGON

51 *Ore.* 275, 95 *Pac.* 200

This is a controversy between the settlers in Otis valley over the waters of Otis creek and its tributaries. * * * Prior to 1903 there was water enough for the use of all the parties, and there had been

no controversy between them concerning their respective rights; but in that year defendant Altnow constructed a dam 775 feet long and 20 feet high across the channel of Warm Springs creek just below the springs from which it receives its supply, thereby creating a reservoir seventeen acres in area, and with a capacity of 170 acre feet for the purpose of impounding water to be used in irrigating lands belonging to him on the opposite side of the creek from where he had been previously using water. Plaintiffs, insisting that the construction of this dam, the impounding of water and the threatened use thereof will interfere with their rights, brought this suit to enjoin and restrain him from maintaining such dam, or interfering with their use of the water, making Stallard and Robbins parties.

* * * * * * *

BEAN, C. J.: Plaintiffs' claim to the waters of Otis creek is based upon appropriations through two ditches, one known and designated in the record as the "Stewart ditch," taken out on the west side of the creek near the south line of defendant Stallard's land and below the mouth of Warm Springs creek, and the other, the "Duncan ditch," taken out lower on the east side. * * * Defendant Altnow claims a right to the waters of the Warm Springs creek prior in time to that of the plaintiffs by reason of an appropriation alleged to have been made in 1883, and as riparian proprietor.

* * * * * * *

It is claimed that defendant Altnow is entitled to the use of water from Warm Springs creek by right of prior appropriator to the extent of his original appropriation, and to the surplus water in such stream, if any, as riparian proprietor, because the filing of his predecessor in interest was the first one made on the stream. There are several reasons why this position can not be sustained. * * * Defendant Altnow, if he is entitled to use any part of the waters of Warm Springs creek as riparian proprietor, has no right thereto superior to the other parties to this litigation. Otis creek flows through the land of all of them, and their rights, as riparian proprietors, to the use of the waters, are equal, and one is not superior to the other. Every riparian proprietor is entitled to a reasonable use of the water of a nonnavigable stream flowing through his land, and, after the natural wants of all the other riparian proprietors have been supplied he may use their corresponding rights. Jones *v.* Conn, 39 Ore. 30, 54 L. R. A. 630, 87 Am. St. Rep. 634. But in this respect the rights of all the riparian proprietors are equal, regardless of location on the stream, or date of acquiring title. There can be no priority of rights as between riparian proprietors. The right of the first settler is not superior to that of the last. No one riparian proprietor can use the water for irrigation to the prejudice or injury of the correlative rights of the others above or below him on the stream, unless he has some prior right to divert it or title to some exclusive enjoyment. A riparian proprietor has no title to the water flowing over his land, but only the right to use it while it is passing

his place, and this right is subordinate to a corresponding right in all the other proprietors. One proprietor can not unreasonably detain or give the water another direction, or use it in any way to the injury of the others. It necessarily follows, therefore, that the nature and extent of the right of a riparian proprietor to the water of a stream for irrigation can not be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose ordinarily be definitely ascertained or determined, although this may perhaps be done in exceptional cases. It is necessarily a varying quantity, depending upon the use by other proprietors, and whether it is an injury to them. Each case must be decided, as it arises, upon its own particular facts and circumstances. This disposes of the position that defendants Stallard and Robbins have some superior claim to the waters of the stream because of the priority of their filings. There is another reason why defendant Altnow can not assert the right to the use of the surplus water of the stream as riparian proprietor. It is the settled law in this state that an appropriator of water from a stream flowing through his premises has not the right as riparian proprietor to the use of the surplus for irrigation, as against subsequent claimants. Low *v.* Schaffer, 24 Ore. 239; North Powder Milling Co. *v.* Coughanour, 34 Ore. 9; Brown *v.* Baker, 39 Ore. 70. While the doctrine of prior appropriation and riparian rights are not so antagonistic that they may not exist in the same locality, Crawford Co. *v.* Hathaway, 67 Nebr. 325, 60 L. R. A. 889, 108 Am. St. 647, a settler upon a nonnavigable stream has an election either to rely upon his rights as riparian proprietor or to make an appropriation of the water if it is free and subject to appropriation, and claim as an appropriator, but he can not do both.

There is considerable evidence in the record upon the question as to whether the permanent maintenance of the dam and reservoir by the defendant will necessarily be an injury to the plaintiffs; but we think the proof is not sufficiently clear upon this point to justify a decree requiring him to remove the dam. It is probable that it may be maintained and operated in such a manner as not to injure the plaintiffs, and, if so, defendant is entitled to use it; but he will be enjoined from using any water from the reservoir formed above the dam on the high or bench land west of the creek, when it is needed by plaintiffs or other parties on the stream below him.

A decree will be entered in accordance with this opinion.[60]

[60] See Huffner *v.* Sawday, 153 Cal. 86, p. 192, supra, 94 Pac. 424, Southern Cal. Investment Co. *v.* Wilshire, 144 Cal. 68, 77 Pac. 767; Miller and Lux *v.* Enterprise Canal and Land Co. (Cal.), 147 Pac. 567; Jones *v.* Portsmouth Aqueduct, 62 N. H. 488; Barton *v.* Riverside Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331n; Newport *v.* Temescal Water Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; Miller and Lux *v.* Madera Canal and Irrigation Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391n; McCook Irrigation Co. *v.* Crews, 70 Nebr. 115, 102 N. W. 249.

ALTA LAND AND WATER CO *v.* HANCOCK ET AL.

1890. SUPREME COURT OF CALIFORNIA

85 *Cal.* 219, 24 *Pac.* 645, 20 *Am. St.* 217

Fox, J.: This is an action to quiet title to the claim of plaintiff, a corporation, to the right to use seven-eighths of the waters of East Twin creek, in San Bernardino county. Judgment went for the defendants, from which plaintiff appeals, the case coming up on the judgment-roll. Plaintiff claims by prescription in favor of its grantors, and under grant of such alleged prescriptive right to itself. Defendants are riparian proprietors on both sides of the stream below the point where plaintiff claims the right of diversion. It was alleged and shown that in April, 1875, the defendant Hancock, who was then the owner of a tract of 1,280 acres, part of the Muscupiabe rancho, lying on both sides of this creek, and below the point at which plaintiff claims the right to divert seven-eighths of its waters, (and under whom the other defendants now claim as grantees,) took the preliminary steps to acquire by appropriation 500 inches of this water, but this right of appropriation was never perfected, and its consideration is of no moment in this case, as it is conceded by both parties that defendants take nothing by that proceeding. Nor is it necessary in this case to discuss the character or extent of the right of Hancock or his grantees to the use of the waters of the creek by virtue of his riparian proprietorship. That they had some right in the flow and to the use of said waters as such riparian proprietors is conceded on both sides. To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation. The term "appropriation," as applied to the acquirement of the right to the use of water, has in this state a statutory technical meaning; and the simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period described by the statute of limitations, gives a prescriptive right which will extinguish the rights of the riparian proprietor. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse, and under claim of right, and sets the statute in motion against such prior claimant. In this case the claim of plaintiff is based upon prescription, pure and simple. If it is valid it has, to the extent of seven-eighths of the waters of that creek, extinguished the rights of defendants. If

under the facts, however, plaintiff's claim has not merged into title by prescription, then plaintiff has no right which can be quieted in this action, and it is not in position to question the right or the extent of the right of defendants. The court finds that in April, 1875, the defendant Hancock was the sole owner of the 1,280-acre tract of land hereinabove mentioned; that in May, 1887, he conveyed the same, with the water rights appurtenant thereto, to the other defendants herein, reserving to himself seventeen acres thereof, with a certain quantity of the water for the use of said seventeen acres and that at the time of the filing of the complaint herein the defendants were the owners in fee of the whole of said tract; that in the spring of 1876 one Burton entered upon eighty acres of land, part of said 1,280-acre tract, situate from a half to three-quarters of a mile from the channel of the creek, claiming the same as a squatter, and believing the same to be government land; and at the time of such entry diverted from the channel of said creek, at a point beyond and outside of the rancho, all the waters of said creek, and conducted the same through an artificial channel made by him to the said eighty-acre tract so entered upon by him, and there used all of said water for the irrigation of said eighty-acre tract until some time in 1877, when one Stones in like manner entered upon a forty-acre tract, part of said 1,280-acre tract, adjoining that so entered upon by Burton, and thereafter, by some arrangement between Burton and Stones, the latter commenced to use one-fourth of the water so diverted by Burton for the irrigation of his forty-acre tract; that Stones also entered as a squatter, and he and Burton both claimed adversely to Hancock; that they so continued to use all the said water for said purpose and upon the said lands, and not elsewhere, until August, 1887; that the said use was continuous, open, notorious, peaceable and adverse to all the world; that while so using and claiming the said water they also used and claimed the land upon which the same was used, by the same character of holding and title, namely, adverse to Hancock, but never set up any special or distinctive right in the water different from their right in the land, but claimed both land and water; that in July, 1881, Hancock, being then the owner of the whole of the said 1,280 acres, commenced an action in ejectment against Burton, Stones and others for the recovery of the possession thereof, which culminated in a judgment in favor of Hancock in August, 1885, appealed to this court, where the judgment was affirmed, 73 Cal. 52, and the remittitur therein filed in the court below August 4, 1878, when a writ of possession was issued under which Burton and Stones were put out, and possession restored to Hancock; that five years did not intervene between the time when the water was so diverted by Burton, and the time when such action was commenced by Hancock; that it is not shown that said Burton or Stones ever paid any taxes on said water-right, or on the right to divert the same, or that any were ever levied thereon, but it is shown that Hancock has paid taxes, and taxes have been

levied upon the whole of said 1,280 acres of land every year since and including the said year 1876. The court then finds that during the year 1887, and prior to the execution of the writ of possession, all the right which Burton and Stones, or either of them, acquired in and to the said waters, or to use and divert the same, came down by certain mesne conveyances, to and became vested in, this plaintiff, who acquired and took the same with full notice of the pendency of said ejectment suit, and that plaintiff still holds the same. And as conclusion of law, the court finds that the plaintiff at the time of the commencement of this action had no estate, right, title or interest in or to the waters of said creek, or any of the tributaries thereof, and thereupon ordered judgment for defendants, which was entered accordingly.

It will thus be seen that the whole question is whether these facts gave to plaintiff's grantors a prescriptive right to the diversion and use of that water. This right becomes fixed only after five years' adverse enjoyment. Crandall *v.* Woods, 8 Cal. 136; Water Co. *v.* Crary, 25 Cal. 504. And to have been adverse it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. American Co. *v.* Bradford, 27 Cal. 360. "In order to constitute a right by prescription there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 185. To be adverse it must be accompanied by all the elements required to make out an adverse possession. The possession must be by actual occupation, open, notorious and not clandestine. It must be hostile to the other's title. It must be held under claim of title, exclusive of any other right, as one's own. It must be continuous and uninterrupted for the period of five years. Thomas *v.* England, 71 Cal. 458. Can it be said that the use made of this water was adverse to Hancock's riparian right when it was used upon his own land riparian to the stream, and under no pretense or claim of right to divert or use it elsewhere? We think not. The use of the land may have been adverse, and against his will, but the bringing of the water to and use of it upon his land was an improvement of his land, and an advantage to him, not an act which of itself gave him an independent cause of action for its diversion, and required him to bring such action or lose his right in the water. If, while as trespassers occupying a portion of his land, Burton and Stones had undertaken to divert the waters of the stream, and carry them away from the land, this would have been an act so hostile to his right as to have given him an independent cause of action for the diversion. If, after notice of such an act, he had suffered them to divert the water away from his land for the period of five years, without interruption, they might have acquired a right in the water which would have extinguished his own; but, as his right in the water, or the use

thereof, was a corporeal hereditament appurtenant to his land, we can not conceive that such right would be lost by user upon his land, under no claim of right to divert or use it elsewhere. Nor was the use "uninterrupted" for the period of five years. The court has apparently ex industria refrained from the use of that word in the findings. And yet the use must be not only adverse, under claim of right, open and notorious, but it must be "uninterrupted" for the period of five years to ripen into a right by prescription. The court has found that the use was "continuously" from 1876 to 1887, but not that it was "uninterruptedly." Counsel insists that the words are synonymous,—that the one means the same as the other. They are very nearly, but not in law exactly, synonymous. This case furnishes a fair illustration of the distinction between them. Burton and Stones used this appurtenant to the land "continuously" for the period of eleven years. They used the land itself, and this appurtenant to it on the land, during the whole of the same period, "continuously." The use of the land was unquestionably adverse to the claim and right of Hancock, and yet its continuous use for the period of eleven years did not give to those using it a right to the land by prescription, though the rule of law as to acquiring right to land and right to water by prescription is the same. Then why did it not give the right? Because just before the expiration of the five years the use was "interrupted" by the bringing of the action in ejectment, and this interruption, though it did not break the continuity of use until final judgment and writ of possession, six years afterwards, stopped the running of the statute, and no right could be acquired by use after that during the pendency of that suit. As this in law so interrupted the use of that land as to prevent the acquiring of a prescriptive right to the land itself, so it also, and by the same act, so interrupted the use of every appurtenant to the land which was being used on it, as to prevent the acquiring a prescriptive right to that appurtenant, to use it there or elsewhere. The recovery of the land in ejectment carried with it the recovery of every appurtenant thereto. Burton and Stones, according to the findings, had never attempted to acquire, or asserted any right in, the water, independent of or segregated from the land, or under other right, title, or claim than that which they asserted to the land. They therefore, when ejected, had nothing to convey to plaintiff, and the plaintiff acquired nothing under them.

We fully concede the proposition contended for by appellant, based upon Smith *v.* Logan, 18 Nev. 149, that the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used. But it does not follow from this that the use of water upon land to which it is already appurtenant by one who is a trespasser thereon will give him such a right in the water as that he may thereafter divert it from the land, or, upon being ejected therefrom, convey to a

stranger a legal title in the water or in the use thereof. We do not mean to be understood as holding, and indeed it is not claimed, that anything has been added to the rights of defendants by the acts of Burton and Stones; but simply that nothing has been taken from those rights. It is probable that there are those as against whom these defendants could not successfully claim the right to the use of all the water which Burton and Stones carried upon their lands; but the measure of their rights is not here involved. The judgment in this case does not determine them. It simply determines that the plaintiff has no right which it is entitled to have quieted as against the defendants. Beyond the proposition above stated, the case of Smith *v.* Logan is not in point. Nor is there anything which militates against the view here taken in the further proposition insisted upon by appellant, that the 120 acres upon which Burton and Stones used this water were not riparian to the stream. Situate as this tract was, a half-mile or more away from the stream, if it had been held by a title separate from and independent of the 1,280-acre tract, it would not have been riparian, and no portion of the waters of the stream would have been appurtenant to it; but the 120 acres was a part of, and never segregated from, the 1,280 acres, all of which was riparian to the stream. We do not understand Lux *v.* Haggin, 69 Cal. 255, as holding, as claimed by appellant, that only that portion of a larger tract bordering upon a stream is riparian thereto which is actually washed by the waters of the stream; or only so much thereof as the waters of the stream are sufficient to irrigate. Such a rule, while it would limit the area of riparian lands to a comparatively infinitesimal quantity, would extend the rights of a riparian proprietor to whom the water might first come far beyond anything heretofore recognized or claimed for them. It would recognize the right of such proprietor to consume, if he could, on his riparian lands, all the waters of the stream for purposes of irrigation, without regard to the rights of other proprietors below him, either for their natural wants or for irrigation. So far the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though not perhaps the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication. Nor can the area of the lands to which riparian rights are appurtenant be diminished by the acts of a trespasser segregating for the time being the actual occu-

pancy, without segregation of title. Nor can the use of all the waters of a stream upon 120 acres of land change the law, and establish it as a fact that there can be but 120 acres riparian to that stream as claimed by appellant.

We do not deem it necessary to follow the counsel for appellant in their discussion of the question of the payment of taxes as one having any effect upon this case; nor do we find anything in any of the authorities cited in conflict with the views here expressed. Judgment affirmed.[61]

We concur: Sharpstein, J.; McFarland, J.; Paterson, J.; Thornton, J.; Works, J.

[61] See Smith *v.* Logan, 18 Nev. 149, 1 Pac. 678; Patterson *v.* Ryan, 37 Utah 410, 108 Pac. 1118; Sullivan *v.* Northern Spy Mining Co., 11 Utah 438, 40 Pac. 709, 30 L. R. A. 186n, post, p. 667; Kendall *v.* Joyce, 48 Wash. 489, 93 Pac. 1091; Avery *v.* Johnson, 59 Wash. 332, 109 Pac. 1028; Tucker *v.* Jones, 8 Mont. 225, 19 Pac. 571; Seaweard *v.* Pacific Live Stock Co., 49 Ore. 157 88 Pac. 963; Smith *v.* Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. 408; Prentice *v.* McKay, 38 Mont. 114, 98 Pac. 1081.

CHAPTER IV

RIGHTS IN DIFFUSED AND UNDERGROUND WATERS

ACTON *v.* BLUNDELL ET AL.

1843, ENGLAND. COURT OF EXCHEQUER CHAMBER

12 Mees. & Wels. 324

* * * * * * *

TINDAL, C. J.: The question raised before us on this bill of exceptions is one of equal novelty and importance. The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain under-ground springs, streams and water-courses, which, as he alleged, ought of right to run, flow and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit and enjoyment of the water of the said spring or well for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinking was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and

third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

The question argued before us has been in substance this: whether the right to the enjoyment of an under-ground spring, or of a well supplied by such under-ground spring, is governed by the same rule of law as that which applies to, and regulates, a water-course flowing on the surface.

The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of Mason *v.* Hill, 5 B. & Ad. 1, 2 Nev. & M. 747, and substantially is declared by the Vice-Chancellor in the case of Wright v. Howard, 1 S. & S. 190, and such we consider a correct exposition of the law. And if the right to the enjoyment of under-ground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which

would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of Tyler *v.* Wilkinson, in the courts of the United States, 4 Mason C. C. 401 as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there can not properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the under-ground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiesence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbor as he sends down to his neighbor below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well

may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an under-ground spring can be confined: in the present case, the nearest coal-pit is at the distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

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The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusions at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe.

The authority of one at least of the learned Roman lawyers appears decisive upon the point in favor of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, *De aequa et aquae pluviae arcandae, s. 12, "Denique Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihl posse agi: nec de dolo actionem, et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit."*

It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from under-ground springs in his neighbor's well, this

inconvenience to his neighbor falls within the description of *damnum absque injuria,* which can not become the ground of an action.

We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed.

Judgment affirmed.

PHELPS *v.* NOWLEN

1878. COURT OF APPEALS OF THE STATE OF NEW YORK

72 N. Y. 39, 28 Am. Rep. 93

This action was brought to recover damages for the alleged malicious acts of the defendant in drawing off water from plaintiff's well, and to enjoin the commission of further similar acts.

The court found substantially the following facts: The parties were the owners of adjoining premises in the village of Avon. Upon defendant's land was a mineral spring, around which an embankment had been formed, partly by the action of the water and partly artificial, which raised the water in the spring. In September, 1872, plaintiff dug a well upon his land, which struck a vein of mineral water, which rose in the well to within thirteen feet of the surface; plaintiff conducted water from the well to a bath-house and a fountain by means of a pipe laid in the ground, which entered the well about three and a half feet below the surface of the water, and gave an abundant supply of water. Defendant, aware of the operations and constructions of plaintiff, and soon after the completion thereof, dug a ditch through the embankment around his spring, lowering the water about five feet. There appeared to be some subterranean communication between plaintiff's well and defendant's spring, and soon after the digging of the ditch, and in consequence thereof, the water in the well was lowered so that the surface of the water fell below the opening of the pipe, and the supply of water to plaintiff's bath-house and fountain was cut off, and plaintiff suffered damage to a large amount.

The court also found as follows: "That when the defendant dug his ditch, as above stated, he supposed that the water in the plaintiff's well communicated in some hidden and undefined way with the water in his spring; that he expected the lowering of the spring would be followed by a diversion of sub-surface water from the well, and a consequent depression of the surface of the water in the well; that he intended to produce that result; that he dug the ditch for that purpose and no other, and that in so far as such intent and purpose, under the circumstances above found, can constitute malice, his motive was malicious."

As conclusions of law, the court found: "That the defendant had an absolute right to dig the ditch and lower the spring on his own land, as above stated, and that with whatever motive he acted, he invaded no legal right of the plaintiff in so doing. That the plaintiff had no right to have the said spring maintained at any given height upon the defendant's land for his benefit or convenience. That the diversion of sub-surface water from the plaintiff's well in consequence of the lowering of the defendant's spring, and the hurtful effects which resulted to the plaintiff from such diversion, as above stated, do not constitute a legal injury, and are not the subjects of legal redress." And, therefore, that the plaintiff was not entitled to the relief demanded in the complaint.

* * * * * * *

MILLER, J.: The act of the defendant in digging a ditch through the mound which had been formed around the spring on his land, and which had raised the surface of the water therein, was prima facie lawful, and a proper exercise of his right, as the owner of the land, to the enjoyment of the subterranean waters which flowed under the same. The effect of the embankment was to raise the water in the well which had been constructed upon the land of the plaintiff higher than it naturally would have been, and the plaintiff had no right, by prescription or otherwise, to have it maintained by the defendant at that elevation.

The use of the water, as thus increased, was only enjoyed by the plaintiff by the mere permission or license of the defendant, which the latter could revoke at his pleasure. Babcock *v.* Utter, 32 How. 439; Mumford *v.* Whitney, 15 Wend 380; Clinton *v.* Myers, 46 N. Y. 511. The defendant was authorized to restore the water to its natural course for any legitimate and proper purpose, and to this extent, at least, was justified in opening the mound and removing any obstacle to the natural and ordinary flow of the water. That the effect of lowering the surface of the defendant's spring was to cause a diversion of water from the plaintiff's well, and to prevent that full supply which otherwise, and but for the defendant's act, would have been furnished, could not interfere with the exercise of the defendant's right to control the water on his own land.

The object of the defendant in digging the ditch, according to the finding of the judge, was not to lower the water for his own benefit and advantage, but with the intent to produce a diversion of the water from the plaintiff's well; and, in so far as such intent and purpose, under the circumstances, can constitute malice, his motive was malicious. The question arises, then, whether the defendant is liable for the consequences of an act done upon his own land, lawful in itself, because he was influenced by a motive which is alleged to be wrong, and the object was to prevent the use of water by an adjoining owner, which he would not have enjoyed but for the mound upon the land of the defendant. The right of an

owner of land to a free and uninterrupted use of the same is absolute and complete, so long as he does not infringe upon the rights of his neighbors. And as a result of this well-settled principle, such owner is also entitled to the enjoyment and use of all springs hidden beneath the surface of the soil, and flowing therein by means of subterranean and unknown channels, for all legitimate and proper purposes. In the case at bar, the plaintiff was enjoying the use of water which had been provided by the embankment on defendant's land, and the act of the defendant merely restored the water thus temporarily retained, to its previous natural course. It is not by any means clear that the assertion of a lawful right on one's own land, even although it is not designed to benefit the party who seeks to maintain it, and may injure an adjoining owner, constitutes legal malice for which a remedy by action exists. Strictly speaking, such an act is but a vindication of what the law sanctions, and, of itself, furnishes no just ground for complaint. It may have been lawfully done, by the defendant, to prevent a diversion of water, the use of which he claimed, and which if allowed to continue, by lapse of time, might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent can not well be considered as malicious, or the purpose a wrongful one.

That it proves injurious to another, is more the fault of the party who reaps a benefit from that which does not belong to him, than of the one who was originally entitled to it, and is only claiming his just rights. While the law does not allow an owner to erect on his own land, near the house of another, structures for carrying on an unwholesome and obnoxious trade, which may poison the air, and constitute a nuisance that interferes with a proper enjoyment of the property of an adjoining owner, and does not permit a person, in any form, to disturb a legitimate use of another's property, it also does not interpose its shield for the protection of such owner in what does not actually belong to him. If the exercise of a lawful right can be regarded as malicious and willful, then the obstruction of lights of a neighbor which are not ancient, and not entitled to protection for that reason, might be considered as a ground for the interposition of the courts, and the revocation of a temporary license to pass over the lands of another as unauthorized. The motive, be it what it may in such a case, can have no effect, and does not prevent the assertion of the right of the real owner. Mahan *v.* Brown, 13 Wend. 261.

There are cases in this state besides the one last cited, which sustains the principle that a party is not debarred from the vindication of a legal right because he is actuated by an improper motive. In Pickard *v.* Collins, 23 Barb. 444, it was held that the injury arising by the use of one's own land to another's property must be a legal injury; an invasion of some legal right, as erecting a build-

ing, or carrying on a business which so obstructs the enjoyment of another of his property, as to amount to a nuisance, or removing the soil or placing something on the soil of another, and that the liability of the defendant does not depend upon the motives with which the erection was made. It was said that the fallacy of a contrary doctrine which was contended for, "consists in its overlooking a fatal defect in a right of action in such a case, the absence of any legal injury. Bad motives in doing an act which violates no legal right of another can not make that act a ground of action." The case of Mahan *v.* Brown, supra, is reviewed at length and approved in the case last cited. In Clinton *v.* Myers, 46 N. Y. 511, the action was brought to restrain the defendant, the owner of the land upon the stream below, from opening the gate of plaintiff's dam and letting off the accumulated waters, he claiming a right to do so, and it was held that it was immaterial that the defendant insisted upon his right to the natural flow of the water in the stream from a bad motive and for the purpose of annoying the plaintiff, and that a court has no power to deny a party his legal right, because it disapproves his motives for insisting upon it. These cases tend to establish the doctrine in this state, that if a man has a legal right courts will not inquire into the motive by which he is actuated in enforcing the same. A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. An idle threat to do what is perfectly lawful, or declarations which assert the intentions of the owner might often be construed as evincing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred some times from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights. I have been unable to discover any decision in this state which is in conflict with the views stated.

In Panton *v.* Holland, 17 J. R. 92, some remarks are made as to acts, lawful in themselves, which became actionable if done with malice. That case was an action against an owner of adjoining lands, who, while digging for a lawful purpose on his own land, caused an injury to his neighbor's house, and is not in point. The doctrine laid down in the opinion in The Trustees of Delhi *v.* Youmans, 50 Barb. 320, is obiter, and is not upheld by the authorities relied upon. The principle discussed is also supported by other cases. In Chatfield *v.* Wilson, 28 Vt. 49, the defendant placed within his own land, and near the line of the plaintiff's land dry hard earth which prevented the plaintiff from availing himself of the water which had before percolated into the plaintiff's land, and supplied a reservoir placed therein from which the water had been drawn and used by him, and it was held that the act being lawful of itself could not subject the defendant to damages, unless by

reason thereof some right of the defendant had been violated. That the maxim *sic utere tuo ut alienum non laedas* applies only to cases where the act complained of violates some right, and an act legal in itself violating no right cannot be made actionable upon the ground of the motive which induced it. This case goes further than is required in order to sustain the defense here. See, also, South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505, which upheld the same rule as to the motive. In a subsequent case, Harwood *v.* Benton, 32 Vt. 737, the court refer to the decision in Chatfield *v.* Wilson in respect to excluding a wanton and improper motive as an element on the ground of the defendant's liability, remarking that in the present case there is no imputation of such motive, but express no opinion thereon while they indorse the main point "as a sound exposition and application of the law."

There are cases in other states where language is employed which, it is claimed, upholds the doctrine that an act lawful in itself may be made unlawful, because the party who does it is actuated by malice. Wheatly *v.* Baugh, 25 Pa. St. 528; Roath *v.* Driscoll, 20 Conn. 533; Carson *v.* W. R. R. Co., 8 Gray 423; Howland *v.* Vincent, 10 Metc. 373; Parker *v.* B. & M. R. R. Co., 3 Cush. 114; Greenleaf *v.* Francis, 18 Rich., 117, 122. The remark of the court in Greenleaf *v.* Francis, that the rights of the defendant should not be exercised from mere malice, are referred to in Chatfield *v.* Wilson, supra; and it is said that, as applied to that case, or the one then at bar, "the position was unsound and against principle and authority." Without considering the cases last cited at length, it is enough to say that they are not directly in point, and none of them, we think, go far enough to sustain the right of the plaintiff, in the case at bar, to the relief sought, under the circumstances here presented. Some English cases are also relied upon as sustaining the doctrine contended for by the plaintiff's counsel. In a leading decision (Acton *v.* Blundell, 12 M. & W., 338), the defendant found and sunk a coal mine on his own land, the effect of which was to cut off the under-ground veins and currents which supplied the plaintiff's well, and to prevent his operating his mill. It was held that there was a marked and substantial difference between the law as to the right to enjoy the under-ground spring of water, and that by which a water-course flowing on the ground is governed; that the case does not fall within the rule which obtains as to surface springs, and in analogy therewith, and that the person who owns the surface may dig therein and apply all that is there found according to his own free-will and pleasure; and if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience falls within the description of *damnum absque injuria*, which can not be the ground of an action. In the head-note of the case, it is stated

that the owner, in carrying on the mining operations in the usual manner, drained away the water. The civil law, as stated by Marcellus, was cited, and Maule, J., translated the original text as meaning that "if a man digs a well in his own field, and thereby drains his neighbor's, he may do so, unless he does it maliciously." It will be seen that there was no question in the case last cited as to the motive of the defendant, and that point was not distinctly passed upon, nor do we think it necessary to determine the question here; but, even if the doctrine of the civil law, as defined, might apply to a case where a man deliberately and with malice prepense set to work to drain off and destroy his neighbor's well, yet, giving to the rule stated full force and effect, it is quite obvious that it has no application to the present case.

In Chasemore *v.* Richards, 7 House of Lords Cases 387, it is laid down that the owner of land has a right to the enjoyment of the land and to the under-ground waters upon it, and he may, in order to obtain that water, sink a well, but that he ought to exercise such right in a reasonable manner and with as little injury to his neighbors' rights as may be, and it is said that "the civil law deems an act otherwise lawful in itself illegal, if done with a malicious intent of injuring a neighbor, *animo vicino nocendi.*" So, also, it is said in some of the reported cases, that the owner of land may be liable when he uses his land as an instrument of injury or malice, or is actuated by a malicious intent.

The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another. But not a single case is cited which sustains the doctrine that the owner of land cannot assert a legal right, while, as we have seen, there is considerable authority in a contrary direction, as well as the dicta of some of the most learned and able judges.

It is said by Mr. Angell, "the question has been raised and discussed, in several of the cases cited, whether a land-owner, who by acts done upon his own ground, has intercepted under-ground waters, and prevented them from percolating into another land-owner's well, or has actually abstracted water from such well, will be liable therefor in consequence of being actuated in his operations by malicious motives. It will be observed, however, that in no one of these cases has a land-owner been held liable for such acts in any court of last resort merely on this ground." Angell on Watercourses (6th ed.), sec. 114, p. 188. Washburn, in his work on Easements (3d ed.), p. 475, also says: "The presence or absence of malice, as a criterion of liability for digging in one's own field, is clearly stated in the civil law, and has been assumed as essential in determining similar questions at common law. But if one has a legal right to do certain acts in regard to his own property, it is difficult to imagine how he should forfeit those rights by doing them

from unfriendly motives toward the party who is affected by them." The learned author cites from 8 Gray, 410, where the court says, that, "if the defendant had authority and acted within the scope of it, he is not a trespasser because his motives or purposes, with regard to the plaintiff, were unkind or malicious."

The result of the examination of the subject, is that neither upon principle nor authority was the defendant liable for doing a lawful act upon his own premises. In this aspect of the case, it is not necessary to determine whether, under a different state of facts, the motive or intent or the malice of the owner of the land should be taken into consideration.

For the reasons given, the judgment should be affirmed.

All concur, except Earl, J., dissenting; Church, Ch. J., and Allen, J., absent.

Judgment affirmed.

CHATFIELD *v.* WILSON

1855. SUPREME COURT OF VERMONT

28 Vt. 49

BENNETT, J.: This is the first time within my knowledge, that the question has ever come before our courts, in relation to the rights of adjoining proprietors of lands to water percolating under the surface, through wet and porous ground, and the case may be considered somewhat important in principle, as well as novel, in this state. The court below, on this point told the jury, in substance, that the defendant had the right to prevent the escape of water from his own land to the plaintiff's tub, which he had sunk on his own land, and that he might lawfully do all that was necessary to restore the water to its original flow, and that it was not material what his motive was: and that he had the right, on his own land, to prevent the natural flow or escape of water, in or underground, from his to the plaintiff's land, provided it was done to secure, in a reasonable manner, a supply of water for himself, his farm, and cattle; but if done solely to injure the plaintiff, and deprive him of water, and not to benefit himself, then he would be liable. This charge is evidently based upon the ground that there were certain correlative rights existing between these parties, in the use of the water percolating in and under the surface of the earth. The rules of law which govern the use of a stream of water, flowing in its natural course over the surface of lands belonging to different proprietors, are well settled, and the correlative rights of the adjoining proprietors are clearly defined. Each proprietor of the land has the right to have the stream flow in its natural course over

his land, and to use the same as he pleases for his own purposes, not inconsistent with a similar right in the proprietors of the land above or below him, but no proprietor above can diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any proprietor below throw back the water upon the proprietor above, without some license or grant. But we think the law governing running streams is not applicable to under-ground water, and that no light can be obtained from the law of surface streams; and if it is to be established that there are correlative rights existing, between adjoining proprietors of land, to the use of water percolating the earth, an entire new chapter in the law will be necessary to define what these rights are, and to put them on some tangible and practical ground, that the rules concerning them may be applied to common use. But from the very nature of the case, this seems impracticable.

The laws of the existence of water under ground, and of its progress while there, are not uniform, and can not be known with any degree of certainty, nor can its progress be regulated. It sometimes rises to a great height, and sometimes moves in collateral directions, by some secret influences beyond our comprehension.

The secret, changeable, and uncontrollable character of underground water in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be seen and known, and is uniform. They are not in the earth and a part of it, and no secret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law,—the great law of gravitation.

There is, then, no difficulty in recognizing a right to the use of water flowing in a stream as private property, and regulating that use by settled principles of law. We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

In the case of Acton *v.* Blundell et al., 12 M. & W. 324, it was held that the owner of land who had made a well in it, and thereby enjoyed the benefit of under-ground water, had no right of action against an adjoining proprietor, who, in sinking for and getting coal from his own soil, in the usual and in a proper manner, caused the well to become dry. A query is added whether it would have made any difference if the well had been enjoyed by the plaintiff for more than twenty years. In the case of Roath *v.* Driscoll, 20 Conn. 533. the doctrine is fully advanced that no right is gained by a mere continued preoccupancy of water under the surface by any artificial

means for a period of fifteen years or more. The court say, "each owner has an equal and complete right to the use of his land and to the water which is in it;" and they say "the water combined with the earth, or passing through it by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself, any more than the metallic oxyds, of which the earth is composed," and they further add, "water, whether moving or motionless, in the earth, is not, in the eye of the law, distinct from the earth." If it is true that subterranean water is to be treated as a part of the earth, it must follow that there are no correlative rights in the enjoyment of such water, between adjoining proprietors of land, and both the case in the 12th of M. & W. and 20 Conn. proceed upon that ground. The case of Greenleaf *v.* Francis, 18 Pick. 117, goes upon the same principle, and it was there held that no action would lie against a man who dug a well on his own land, although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant, or an adverse user. The case is really put upon the ground that "every one has the liberty of doing, on his own ground, whatever he pleases, even though he occasion some damage to his neighbor;" and the court say, "there is nothing in the case, then at bar, which limited or restrained the owners of the estates severally, from having the absolute dominion of the soil extending upwards, and below the surface, as far as each pleased." This, in effect, negates the position that there can be, upon common principles, correlative rights in underground water. The case of Dickinson *v.* The Grand Junction Canal Company, 9 Eng. Law and Eq. 520, is not opposed to the views taken in the foregoing cases. In that case the water was proved to have been taken from the river, after it formed a part of the stream, not by reasonable use by another riparian proprietor, but by digging a well; and this was treated as a diversion of surface water, and actionable at common law, and, in regard to the abstraction of the water which never did form part of the river, but had been prevented from doing so by the sinking of the wells, it was held, that the mill-owners, being entitled to the benefit of the stream in its natural course, were deprived of part of that benefit, if the natural supply of the stream was cut off, and might have their action, whether the water cut off was a part of an under-ground water-course, or percolated through the strata of the earth. In this case the injury complained of was the diminution of water in a surface stream, and the law applicable to surface streams was applied. The cases, cited by the plaintiff's counsel, which relate to surface streams can give little or no aid in the question before us. The case of Smith *v.* Adams, 6 Paige 435, is also a case where the under-ground water, which was cut off by an excavation on the defendant's land, supplied a spring, and this spring caused a flow of surface water, and the decision was, that the person who had the right to the use of the water in its natural course, or by a prescriptive right, out of its natural course, and was injured

by the excavation, might have redress for the injury. Here, too, the person complaining was injured in his rights to the use of flowing water. Such is also the case in Balston *v.* Bensted, 1 Campbell 463, and no doubt other cases of a like character may be found in the books.

There is no ground to claim that the plaintiff has been injured in his right to the use of water in a surface stream flowing in its natural channel, so far as the case is now before this court, and he can claim no prescriptive right to the water.

The tub was sunk by the plaintiff on his own land, in 1852, and as his evidence tended to prove a foot or more below the channel of the brook, and that, from this tub, the water was taken by artificial means for the use of the plaintiff; and the case shows that the plaintiff's evidence tended to prove that this tub was supplied with water, which filtrated under ground from the brook, and also from the adjoining land of the defendant; and the case, so far as it is sent up to us, only concerns the right of the defendant to cut off the filtration of the water from his own land to the plaintiff's tub by artificial means, and the consequences, if wantonly done.

This then, is fairly a question, as to the rights of the plaintiff in under-ground water. Putting this case, then, upon the ground that the water in question, while in the earth of the defendant, though percolating through it, is not distinct from it, in the eye of the law it becomes an important inquiry whether the act of the defendant, in the obstruction of the under-ground water upon his own premises, can be made actionable, simply upon the ground that the motive was bad which induced it. The act of the defendant in the obstruction of the water, being in itself lawful, could not subject the defendant to damages unless, by reason thereof, some right of the plaintiff has been violated. The maxim, "*Sic utere tuo, ut alienum non laedas,*" applies only to cases where the act complained of violates some legal right of the party; and it has been attempted to be shown that this underground water can not be made the subject of correlative rights. It is said in Comyn's Digest, under the head of Nuisance, that an action on the case does not lie for the reasonable use of any right, though it be to the annoyance of another. This, it may be said, implies that an action would lie if the use of one's right was unreasonable.

This, no doubt, is true, under proper limitations, as in cases where there is a right common to both parties, as in the use of a public highway, or of the air; or where there is a duty to perform, and a correlative right growing out of it, as the repair of a ruinous house standing so near to the house of another. as to endanger it from its fall. In such a case, no doubt, a repair could be compelled; and, in case of the fall, an action would lie for the special damage. There are also many cases in the books, relating to the relative use of surface streams. where the case has turned upon the question, whether the use

was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are correlative rights to the use of the water, and the boundary of the right is a reasonable use of it. But such cases have no analogy to the case at law, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, can not be made actionable on the ground of the motive which induced it. Such was the case of South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria.* On this point the case of Mahan *v.* Brown, 13 Wend. 261, is a direct authority. There the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house; and it was held, that no action would lie, where the lights were not ancient, and no right had been acquired by grant or user; and that the motive with which the act was done was immaterial. This case goes upon the ground, that the plaintiff was not injured in a legal right.

This is not like the case where the air is contaminated so as to become noxious. There a correlative right is invaded. In the case of Greenleaf *v.* Francis, 18 Pick. 117, it is true, the court charged the jury that if the defendant dug the well where he did, upon his own land for the purpose of injuring the plaintiff, and not for the purpose of obtaining the water for his own use, the defendant was liable in that action. In that case, the verdict was for the defendant, and the plaintiff was the excepting party. The plaintiff could not complain of that part of the charge; and, in bank, there was no occasion to review that part of it; and it is no point in the decision, though Judge Putnam does remark, in the course of his opinion, that "the rights of the defendant should not be exercised from mere malice as the judge ruled below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found, that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar, and the one now before us, the position was unsound, and against principle and authority.

Judgment of the county court reversed, and the cause remanded.[62]

[62] See Mayor of Bradford *v.* Pickles, 1895 A. C. 587; Huber *v.* Merkel, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. 933; Chesley *v.* King, 74 Maine 164, 43 Am. Rep. 569; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; Deadwood Cent. R. Co. v. Barker, 14 S. Dak. 558, 86 N. W. 619.

BALLARD *v.* TOMLINSON

1885. ENGLAND. COURT OF APPEAL

L. R. 29 Ch. Div. 115

This was an appeal from the judgment of Mr. Justice Pearson, 26 Ch. D. 194.

The action was for an injunction to restrain the defendants from permitting a well of defendant Tomlinson to be so used as to pollute the water in or coming into the plaintiff's well; also for damages for injury by reason of plaintiff's well and the source of supply thereto having been polluted by the drainage and sewage from defendants' premises.

The plaintiff was a brewer at Brentford, in Middlesex, and the owner of land and premises there, where he and his predecessors had for years carried on the business of brewers. From 1849 until a few years before 1882, when this action was commenced, the water used for the purpose of the brewery was drawn from a deep well upon the brewery premises. This well was an artesian one, sunk through the London clay, and the sand immediately below, into the chalk stratum to a depth of about 300 feet below the surface. Both the sand and the chalk were water-bearing strata, from which the water found its way by natural pressure into the well, and from thence was pumped up for the use of the plaintiff's brewery.

The defendant Tomlinson was the owner of land and premises adjoining the plaintiff's, and only separated from the brewery by a public highway. A few years before this action, the defendant Tomlinson erected a printing house on his premises, which he let to the other defendant Jackson who occupied it for his business of printing. There was a deep well also on the defendants' land going down to about the same depth as the plaintiff's well, the distance between the two being about ninety-nine yards. The level of the surface of the ground at the defendants' well was about ten feet higher than that at the plaintiff's well. The defendants' well had formerly supplied water to a distillery which had once been carried on at the defendants' premises, but the distillery had been discontinued in 1874, when the defendant Tomlinson constructed a drain from a water-closet attached to the printing house, by means of which the sewage of the closet and the refuse of the printing house found its way into the defendants' well. The two wells had a common source of supply of water, which percolated underground from the defendants' land to that of the plaintiff, and there was evidence that the sewage and refuse which so came into the defendants' well polluted such common source of supply to

such an extent that the plaintiff was unable to use the water from his well for brewing purposes, and that he had thereby sustained damage.

Mr. Justice Pearson held that as the plaintiff had no property in the underground water which came from the defendants' land, he had no cause of action against the defendants for polluting such water, and he therefore dismissed the plaintiff's action.

The plaintiff appealed.

* * * * * * *

BRETT, M. R.: As the proposition of law which is raised by this case seems to all of us clear, we think it right to give judgment at once.

The defendant Tomlinson was possessed of a well upon his own property, which at one time he used merely as a well, but afterwards in a manner inconsistent with its being merely a well, as he allowed the sewage arising from the use of his buildings to go into the shaft of such well. Now it seems to me that the shaft of that well is an artificial thing; and that the defendants therefore collected a quantity of sewage into an artificial reservoir. The plaintiff, at a considerable distance from this well (the distance to my mind is wholly immaterial) has a well on his own property of considerable depth, which is lower than the bottom of this artificial shaft or well of the defendants. The collected sewage in the artificial shaft on the defendants' property has gone through the sides or bottom of this well into what is called the percolating water below the defendants' land. It is said on behalf of the defendants that but for the mode in which the plaintiff uses his well by pumping, the sewage in the artificial shaft on the defendants' property would not have gone into the percolating water beneath his land, or if it had, it would have remained on his land, or at all events, it never would have gone into the plaintiff's well. In the result, when the plaintiff used his own well by means of the mechanical pump it is clear that the water which then came into his well from the percolating water beneath his own land came there adulterated by the sewage which had been in the artificial shaft in the defendants' well.

Then arises the question whether the plaintiff under the circumstances can maintain an action against the defendants? Now what are the rights of the parties? It seems to my mind to be clear from the decisions that no one has at any time any property in water percolating below the surface of the earth, even when it is under his own land, but it is equally clear that everybody has a right to appropriate that percolating water, at least whilst it is under his own land, to the extent that he may take it all so as to prevent any of it going on the land of his neighbor. But his neighbor below him according to the flow of the water, has an equal right before the person above has appropriated it to take it all. He has a right to take the water from the percolating stream un-

der his own land to this extent, that he may thereby cause the water which is under the land above him to come on his own land when it otherwise would not, and then to take that, and so on, until he has absolutely dried the land above him. This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole.

Then arises the question: has any one of those who have an unlimited right of appropriation a right to contaminate that common reservoir or source, as against those who have an equal right with him to appropriate when he does not, or is he bound not to do anything which will prevent anybody to whom that unlimited right of appropriation shall come to have such water unaltered in quality? Now it has been said by the solicitor-general in his clear argument that when the defendants pollute this common source under their own land, they do not pollute any water in which the plaintiff has any property. That is quite true. The plaintiff has no property in that water whilst it is under the defendants' land, nor indeed whilst it is under his own land; and if all that could be said was that the common source was contaminated before the plaintiff had appropriated any part of it, the plaintiff could not, to my mind, maintain any action in respect of that contamination. Suppose a man had tapped this common source some distance off his own land for the purpose of experiment and found it was contaminated before it would come under his own land. I think under those circumstances he could not maintain an action, because he had not appropriated the water, and therefore no injury was done to him at that time. But it does not seem to me to follow from that that he can not maintain an action when water which he has appropriated has been contaminated by something which another person has done to that common source. In other words, it seems to me that although nobody has any property in the common source, yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of those who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbor from having the full value of his right of appropriation.

Then the next point taken by the solicitor-general was this: Assuming it to be true that there is such right to appropriate, yet, if the person who has such right only appropriates by artificial means, and does so to such an extent that if he did not use those artificial means the water he would take would not be contaminated, then the polluted water must be said to be appropriated by him in that state by his own act and therefore he can not maintain the action. I can not think that is a true proposition. The principle of natural user does not apply at all. The plaintiff, if he has a right to use anything in nature, has a right to exercise that

user by all the skill and invention of which man is capable, and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished, because he uses the most artificial or the most ingenious methods. Therefore, however he may appropriate the water from the common source by the use of such artificial means he has a right to have that common source uncontaminated by any act of any other person. Neither does it matter whether the parties are or not contiguous neighbors. If it can be shown in fact that the defendants have adulterated or fouled the common source, it signifies not how far the plaintiff's land is from their land.

The nearest case to the present I take to be the case of Womersley *v.* Church, 17 L. T. (N. S.) 190. I think that that case does show that the first proposition of the solicitor-general is wrong, but I do not think that it governs the second point taken by him. I think that the second point is partly noticed in the case of Whaley *v.* Laing, 2 H. & N. 476, 3 H. & N. 675, but it does not in my opinion want any authority. I disagree with the decision of Mr. Justice Pearson on this ground, that although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that therefore no one is justified in injuring the right of appropriation which everybody else has.

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LINDLEY, L. J.: The question decided in Acton *v.* Blundell, 12 M. & W. 324, and Chasemore *v.* Richards, 7 H. L. C. 349, was the right of a landowner to remove underground water from his own land when that water did not flow in any visible defined channel. The court decided that every owner of land has a right to sink a well in his own land and to take from his well all the water he can get, and that as every owner has this right no owner can maintain an action against another for exercising that right, even although by exercising it he drains underground water from the plaintiff's land and so deprives him of water which would otherwise come to his well. The alternative was to hold that no one could take water from his own well to such an extent as materially to affect the supply to those whose wells were fed from the same sources as his own. This alternative was considered too inconvenient to be laid down as law, and the court was consequently driven to reconcile the conflicting rights of neighboring landowners in the way it did, and to draw a distinction, as regards the right to get naturally supplied water, between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel. How far the distinction was sound it is useless now to inquire; it is settled in law by the highest judicial authority. But the reasons for the distinc-

tion must be borne in mind, or the decisions establishing it may be misunderstood, and be made the basis of reasoning, leading to results which are as startling as they were unforeseen.

The right to foul water is not the same as the right to get it; and in my opinion does not depend on the same principles. Prima facie every man has a right to get from his own land water which is naturally found there, but it frequently happens that he can not do this without diminishing his neighbor's supply. In such a case the neighbor must submit to the inconvenience. But prima facie no man has a right to use his own land in such a way as to be a nuisance to his neighbor, and whether the nuisance is effected by sending filth on to his neighbor's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbor's land, or whether the nuisance is effected by poisoning the air which his neighbor breathes, or the water which he drinks, appears to me wholly immaterial.

If a man chooses to put filth on his own land he must take care not to let it escape on to his neighbor's land: Tenant *v.* Goldwin, 1 Salk, 21, 360; and not let it poison the air which reaches it; Comyns' Dig., Action on the Case for Nuisance, A. So if a man chooses to poison his own well he must take care not to poison waters which other persons have a right to use as much as himself. To hold the contrary on the ground that the water is not their property until they get it, and that it is poisoned before they get it, is to take an inadequate view of the subject, and to overlook the fact that the law of nuisance is not based exclusively on rights of property. Light is not property, and yet if a man has a right to have it come to his windows he can maintain an action against those who prevent it from so coming. So air is not property, but a man who poisons the air which another has a right to breathe commits an actionable wrong. Upon precisely the same principle underground water which supplies a well may not be the property of the owner of the well, but he has a right to take and use such water, and upon principle he appears to me to have a right of action against those who poison what he has a right to get. If indeed the well owner had no right to get unpolluted water, he would have no right of action, but it lies upon those who deny this right to maintain their position. Prima facie, at all events, the right of a man to get water from his well is to get the water as nature supplies it, and if any one contends that he has a right to pollute the natural supply he must establish such right. A right to foul a stream may be acquired by prescription; and possibly a right to foul an underground basin of water might be similarly acquired; but no such question arises in this case. Upon principle, therefore, and independently of authority, the judgment below can not be supported.

On turning to the authorities there is not one which warrants the judgment; whilst there are at least three which are difficult to

reconcile with it: Womersley *v.* Church, 17 L. T. (N. S.) 190; Hodgkinson *v.* Ennor, 4 B. & S. 229; 32 L. J. (Q. B.) 231, and Whaley *v.* Laing, 2 H. & N. 476; 3 H. & N. 675. These decisions show that prima facie one man has no right to foul water which another has a right to get; and if he has a right to get it, the fact that by pumping he draws it partly from the defendant's land is immaterial. The moment any water is taken out of the well, by whatever means, its place is supplied by natural causes operating on all the surrounding water which supplies the well, and if the well is used at all and any of such surrounding water is poisoned by soluble matter it will inevitably find its way into the well. Probably the same thing would take place, though more slowly, by simple diffusion without pumping, but however this may be, the fact that the plaintiff has used a pump to get water out of his well, and has thereby drawn poisoned water from the defendants' land, does not deprive the plaintiff of his right to maintain an action against the defendants for poisoning water which supplies the plaintiff's well.

In my opinion the decision appealed from ought to be reversed. The plaintiff is entitled to an inquiry as to the damages he has sustained, and to an injunction, and to the costs of the action and of the appeal.[63]

FORBELL *v.* CITY OF NEW YORK

1900. COURT OF APPEALS OF THE STATE OF NEW YORK

164 *N. Y.* 522, 58 *N. E.* 644, 51 *L. R. A.* 695, 79 *Am. St.* 666

The judgment grants a perpetual injunction restraining the city of New York from operating its engines, driven wells and pumping stations known as the "Spring Creek Pumping Station," in the borough of Queens, city of New York, on the conduit line near the Kings county boundary line, and awards past damages to the plain-

[63] The abstracts of arguments of counsel and the opinion of Cotton, L. J., are omitted.

See Ball *v.* Nye, 99 Mass. 582, 97 Am. Dec. 56; Ballantine and Sons *v.* Public Service Corp., 76 N. J. L. 358, 70 Atl. 167; Brown and Bros. *v.* Illius, 27 Conn. 84, 71 Am. Dec. 49; Collins *v.* Chartiers Valley Gas Co., 139 Pa. 111, 21 Atl. 147; Kinnaird *v.* Standard Oil Co., 89 Ky. 468, 12 S. W. 937, 7 L. R. A. 451, 25 Am. St. 545; Long *v.* Louisville, &c., R. Co., 128 Ky. 26, 107 S. W. 203; Woodward *v.* Aborn, 35 Maine 271, 58 Am. Dec. 699; Buckingham *v.* Elliott, 62 Miss. 296, 52 Am. Rep. 188; Elliott *v.* Ferguson (Tex. Civ. App.) 103 S. W. 453; Mears *v.* Dole, 135 Mass. 508; Ottawa Gas Light and Coke Co. *v.* Thompson, 39 Ill. 598; Sherman *v.* Fall R. Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799; Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 344; Lowe *v.* Prospect Hill Cemetery Assn., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237; Upjohn *v.* Board of Health, 46 Mich. 542, 9 N. W. 845, 41 Am. Rep. 178.

tiff in the sum of $6,000, together with the costs of the action. The plaintiff was a lessee of certain farming lands situated near Spring creek, within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses. The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of this action, in 1898.

* * * * * * *

LANDON, J. (after stating the facts): The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of under-ground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown. The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one where, because the percolation and course of the subsurface waters are unobservable from the surface, they are unknown, and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment. Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and under-ground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of under-ground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters. That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have, in the just administration of the law, a remedy. In Smith *v.* City of Brooklyn, 160 N. Y. 357, 45 L. R. A. 664, a case in which the defendant, by the use of the same act and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the subsurface level or body of under-ground water not contributing to the supply of plain-

tiff's surface stream or pond. It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. Ellis *v.* Duncan, 21 Barb. 230; Goodale *v.* Tuttle, 29 N. Y. 459; Pixley *v.* Clark, 35 N. Y. 520; Village of Delhi *v.* Youmans, 45 N. Y. 362; Phelps *v.* Nowlen, 72 N. Y. 40; Bloodgood *v.* Ayres, 108 N. Y. 400; Van Wycklen *v.* City of Brooklyn, 118 N. Y. 424. The earlier cases followed the law as stated in Acton *v.* Blundell, 12 Mees. & W. 324, and Greenleaf *v.* Francis, 18 Pick. 117. So far as the extraction or diversion of under-ground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil, so long as it remains there, is—unlike water flowing in a surface stream—a part of the soil itself, Barkley *v.* Wilcox, 86 N. Y. 140; that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and under-ground flow of water are out of sight, and their exact operation and courses are conjectural, and not susceptible of actual observation and proof; and, finally, that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the under-ground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it. In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive

and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters, in which liability has been denied, was well pointed out by the learned judge who wrote for the appellate division in Smith *v.* City of Brooklyn, 18 App. Div. (N. Y.) 340. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff. The judgment should be affirmed, with costs.

Judgment affirmed.

Parker, C. J., and Bartlett, Haight, Martin and Vann, JJ., concur. O'Brien, J., not voting.

KATZ ET AL. *v.* WALKINSHAW

1902. SUPREME COURT OF CALIFORNIA

141 *Cal.* 116, 70 *Pac.* 663, 64 *L. R. A.* 236, 99 *Am. St.* 35

TEMPLE, J.: This appeal is taken from a judgment of nonsuit entered against plaintiffs on motion of defendant. The action was brought to enjoin defendant from drawing off and diverting water

from an artesian belt which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they aver had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes, and for irrigating lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured, if the defendant is allowed to divert the water. These facts are admitted, and further that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived. The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case. The defendant denies that she is taking or diverting water from an underground stream or water course, and alleges that all the water which rises in the artesian wells on her premises, and which she is selling, is percolating water, and is parcel of her premises, and her property. In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground water course, and asserts her right to dispose of the water in the manner alleged, because it is percolating water, not confined to a definite water course. The court sustained that proposition, and for that reason granted defendant's motion for nonsuit.

The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of detritus of varying quantity and material, with no regular stratification. Wells have been sunk at least to the depth of 750 feet, but no bed rock has been found. It has quite an incline from the mountain, and is from 700 to 1,500 feet above sea level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses and as an expert. He says the saturated land is fed—first, by the underflow from the numerous ravines, canons, and streams which enter the valley from the mountains; and, secondly, by the rain and flood water upon and absorbed upon, the slope, and between the artesian belt and the mountains. This water, percolating down into the soil, and constantly pressed forward by water accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed subsurface stream, the witness thought, were on the west "a cemented dyke, which runs through the valley, and the eastern boundary of it is the clay bank or dyke at the south side of the Santa Anna river." Within these limits,

many ravines enter from the mountains, some of them carrying at times great quantities of water, much of which had been appropriated and carried off in pipes or cemented aqueducts. It is evident that, if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. "It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil." It is quite manifest that this body (if it can be so styled) of percolating water can not be called an underground water course to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and the water flowing in streams with known or ascertainable banks, which confine the water to definite channels. All rain water which falls upon the hills and mountain sides which does not flow off at once, as surface water, is absorbed and percolates down in the same way to the valley below. No doubt, limits can be found to every such flow, as in this case. The distinction is well established and, in some respects, different rules of law applied to the two cases. The plaintiffs, therefore, can not establish their claims upon the theory of an underground water course to which they are riparian.

But appellants contend that though they are not riparian to an underground water course, and although the saturated belt carries only percolating water, still they are entitled to the injunction prayed for. The defense, conceding that the water held in the earth is percolating water, relies upon certain decisions which assert and apply literally the maxim *"Cujus est solum, ejus est usque ad inferos,"* and that water percolating in the ground, or held there in saturation, belongs to the landowner as completely as do the rocks, ground, and other material of which the land is composed. and therefore he may remove it and sell it, or do what he pleases with it. He cites authority for the proposition: Hanson *v.* McCue, 42 Cal. 303, 10 Am. Rep. 299; Railroad Co. *v.* Dufour, 95 Cal. 616, 19 L. R. A. 92; Gould *v.* Eaton, 111 Cal. 641, 52 Am. St. 201, and City of Los Angeles *v.* Pomeroy, 124 Cal. 597.

It is obvious at once that the analogy between the right to remove sand and gravel from the land for sale, and to remove and sell percolating water, is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land and also sells water which is the property of his neighbor. And the effect is similar in other respects. By pumping out the water from his lands, he can, perhaps, deprive his neighbors of water for domestic uses, and in fact ren-

der their land valueless. In short, the members of the community, in the case supposed, have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community, and render the neighborhood uninhabitable.

We have derived our law, in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first cases are quite modern. Even yet the text-books on water rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence, as compared with a climate like southern California. The learned counsel for appellants state in their brief that water at San Bernardino is worth $1,000 per inch of flow. Percolating water or water held in the earth is the main source of supply for domestic uses and for irrigation, without which most lands are unproductive. It is also stated that speculators are seeking to appropriate the percolating water by getting title to some part of a watershed or slope, and by running canals and tunnels, and by sinking to obtain water for sale. It is asserted that the lands naturally made moist by percolating water are very productive, and were first settled upon, and have been most highly improved; and he asks whether these lands are to be converted into deserts because speculators may pump and carry away to some distant locality the subsurface waters which rendered the land fertile. Certainly no such case as this has come before a court or could well exist in England or in the eastern states.

It is often asserted that Acton *v.* Blundell, 12 Mees. & W. 324, decided in exchequer chamber in 1843, was the first case in England in regard to percolating water. This shows how unimportant, relatively, the subject is in England. It was an action for damages occasioned by working a coal mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The court instructed the jury "that, if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully do so." This instruction was held to be correct, and that is the real force and effect of the decision. But the chief justice pointed out some respects in which the right to water flowing in an open visible stream differs from an underground flow by percolation. The main difference, so far as concerns the question under consideration, was that percolation was occult, the regulation of which was a difficult matter. One who disturbed the course of percolating water by digging upon his own land could not tell whether he would drain his neighbor's well, nor could the person injured demonstrate that such was the cause of the injury. So, too, when one

diverts water from a visible stream, the fact and the effect are at once known, while as to percolating water its course may be obstructed or changed without the intent to do so, and without knowing that such would be the effect of what was done. His lordship, the case being one of first impression, quotes a passage from a civil-law writer to the effect that, when one digging upon his own land drains his neighbor's well, such neighbor has no cause of action, *"si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit."* His lordship, however, although the case did not require it, disregarded the qualifications found in the civil law, and held that the case was not governed by law which applies to flowing streams, "but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or pervious ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of this right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria,* which can not become the ground of an action." This statement has been frequently quoted, both in England and in this country, and has been generally adopted as a correct statement of the law upon the subject. In Acton *v.* Blundell, as has been said, the working of a mine upon an adjoining estate drained certain springs on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal mine in a proper manner is a reasonable use of land, and that it was without malice, or an intent to injure plaintiff. It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, *"Cujus est solum, ejus est usque ad inferos,"* furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in definite watercourses is greatly changed. And it seems to me a great mistake is made in supposing that, if the plenary property of a land owner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in water-courses having defined channels. The entire argument for what may be called the *"cujus est solum* doctrine" consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was ac-

customed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common-law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it shall be applied might stand in the way. The principle is clearly applicable. A riparian owner may not divert the water, because he would thereby injure his neighbors who have equal rights in the stream. Still he may take a reasonable amount from the stream for domestic purposes, and that may equal the entire flow, although he thereby injures his neighbors. It is a question of reasonable use, and that applies both to the land of the person disturbing the percolation and to adjoining land. He may cultivate his land, and for that purpose ordinarily may drain it, and plow it or clear it from forests, although all these operations may affect the flow of water to the lower proprietor, both in the water-course and by percolation. He was allowed to become the owner for those purposes, and with the understanding that all other proprietors have the same right to use their land. The maxim, *"Sic utere,"* etc., plainly applies as between such proprietors, very much as it does between different riparian proprietors upon the same stream. The title to all land is held subject to this maxim. Such ownership is "but an aggregation of qualified principles, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest use of land by the entire community of proprietors." Thompson *v.* Improvement Co., 54 N. H. 545.

Proprietary rights are limited by the common interests of others, that is, to a reasonable use,—and such use one may make of his land, though it injures others. This proposition is generally recognized, but for some reason has not always been recognized by the courts when considering the subject of percolating water, although all rights in respect to water are peculiarly within its province. This rule of reasonable use answers most effectually the main argument against recognizing any modification of the *cujus est solum* doctrine as applied to percolating water, although in a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water was in using the land in the usual manner, and without the intent of injuring a neighbor.

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The doctrine of reasonable use has been recognized in many cases in the United States,—impliedly in most, as I have stated, but expressly in some. Wheatley *v.* Baugh, 25 Pa. 528, 64 Am. Dec. 721, is one of these, and is remarkable in that the court states as strongly as possible, and with approbation, the *cujus est solum* doctrine. It is even said that the opposite doctrine (applying to such water the rule as to riparian rights) would amount to total

abrogation of the rights of property. It is said one could not clear or cultivate his land or build a house without interfering with percolating water, and, even if rights were admitted to exist, the difficulty of enforcing them would be insurmountable. I think I have shown that the admitted right to a reasonable use of the land and of the water answers all these objections. To my mind, this is so obvious that I can but wonder that such objections have ever troubled the judiciary. And yet, notwithstanding this insistence upon the rule which apparently ignores all equities of others than the owner of the soil in which the water is found, the court felt obliged to, and did, in unequivocal words, declare that the use of it must be reasonable. The proprietor may make a reasonable use of his own land, although in so doing he obstructs or changes the percolation of water to or from his neighbor's land. But by far the most satisfactory case upon the subject is Bassett *v.* Manufacturing Co., 43 N. H. 569, 82 Am. Dec. 179. That was a most elaborately considered case, and this precise question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but, as it is acessible to the profession, I need only say I adopt it in full. The decision was approved in Swett *v.* Cutts, 50 N. H. 439, 9 Am. Rep. 276. Smith *v.* City of Brooklyn, 18 App. Div. 340, 46 N. Y. 141, was in some ways a counterpart of Chasemore *v.* Richards. The city of Brooklyn constructed in Queens county culverts, aqueducts, reservoirs, and conduits, and dug deep trenches to intercept percolating waters, and further sunk, in the process, earth wells, and put in pumps to obtain the water with which the soil, which it owned, was saturated. It thus procured for the use of the city a large amount of water. Plaintiff owned a farm, distant from these water-works about 2,400 feet. Upon the land was a small brook, in which he had placed a dam, which he used for purposes of boat-building and for cutting ice. The brook had carried water all the year round. The operations of the defendant rendered this brook entirely dry, and deprived the plaintiff of his income. Here is a case like that of the village of Croyden. Defendant intercepted percolating water upon its own land before it had reached a water-course. It did not drain water from a defined stream, but the water was prevented from reaching the stream, which was thereby as effectually destroyed as it could have been by draining the water from it. Judge Hatch, who wrote the opinion in the appellate division of the supreme court, begins by quoting the prevailing doctrine in regard to percolating water, from Pixley *v.* Clark, 35 N. Y. 520, 91 Am. Dec. 72: "An owner of the soil may divert percolating water, consume, or cut it off with impunity. It is the same as land, and can not be distinguished in law from land." He says this proposition must be admitted, but nevertheless a case can not be found in this country "where the right has been upheld in the owner of land to destroy a stream, a spring, or a well upon his

neighbor's land, by cutting off the source of its supply, *except it was done in the exercise of a legal right to improve the land, or make some use of it in connection with the enjoyment of the land itself.*" I have italicized the last clause, as it contains the qualification found in the civil law, upon which the English rule is professedly based, and expresses the principle for which I contend. The learned judge admits that the English cases go further, but says that the American cases have not gone further. The learned court gives a concise statement of the reasons given by the English courts for not applying to percolating water the same principle which governs the right of riparian proprietors, and agrees with Justice Coleridge and Lord Wensleydale that they are insufficient. The court recognized the right of the land owner to percolating water, but says the right must be exercised with reference to the equal right of others in their land. He says one may as well claim the right to tunnel into his neighbor's land and take out valuable minerals, as to drain from it water which is also parcel of it, for sale. The peculiar nature of the property which enables one to take it by drainage does not justify the taking, save in the usual and reasonable use of his own land,—in other words, for the proper use and betterment of his own property. Allusion is made in the opinion to the rule, inconsistent with the *cujus est solum* doctrine, that you can not do anything on your land which will drain water from a visible stream or natural pond upon the land of another. * * * But this question was completely put at rest, so far as the state of New York is concerned, by the case of Forbell *v.* City of New York, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. 666. * * * Counsel for the plaintiff in that case contended that since plaintiff owned the percolating water in his own soil, the unlawful draining of it away by the defendant was a trespass committed on his land. This contention was sustained both in the Supreme Court and in the Court of Appeals. The court further indorsed the opinion of Judge Hatch in Smith *v.* City of Brooklyn, from which I have made quotations. If the principle announced in these cases prevails here, the order granting a nonsuit, and the judgment entered thereon, must be reversed. It does not require a reversal of the rule laid down in Acton *v.* Blundell, which has been so often cited and indorsed, but only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts. Whatever the English rule may be, the American cases either recognize the application of the rule of "*Sic utere tuo*" to the subject, or they are cases in which it was wholly unnecessary to consider that subject. Such are the California cases. In the case of City of Los Angeles *v.* Pomeroy, 124 Cal. 597, the question might have been raised, and in the trial court, it may be, was, and in some of the instructions the rule laid down

in Acton *v.* Blundell is asserted without qualification. Still this court was not called upon to, and did not, consider any such question. I think it clear that the American cases do not require us to hold that the maxim *"Sic utere tuo,"* does not limit the right of the land owner to the use of subsurface water, but, on the contrary, all the cases in which the question has been discussed held or admit that such maxim should limit such right where justice requires it. Such, I think, is the proper rule.

It follows that the court erred in granting the nonsuit, and the judgment is therefore reversed, and a new trial ordered.[64]

We concur: Beatty, C. J.; McFarland, J.; Van Dyke, J.; Harrison, J.; Henshaw, J.

BURR *v.* MACLAY RANCHO WATER CO.

1908. SUPREME COURT OF CALIFORNIA

154 *Cal.* 428, 98 *Pac.* 260

SHAW, J.: The plaintiff sued to enjoin the defendant company from pumping water from its wells on land adjoining that of plaintiff, and transporting such water to distant lands, for irrigation and use on such remote lands. The interveners own some of this remote land, and claim rights to receive the water pumped by the defendant, under contracts made with defendant to furnish them with water for use on their respective tracts of land. The plaintiff has wells on his land, from which he pumps water sufficient for irrigation, and other uses thereon, and the injury he complains of is the lowering of the water underneath the surface, caused by the pumping of the defendant's wells, whereby his wells are drained of water. The court, upon the facts found, concluded that the plaintiff was entitled to pump from his wells, for irrigation of one tract of his land containing forty acres, designated as "block 191," for six consecutive days of twenty-four hours each, in each month, a constant flow of twenty-five inches of water, miner's measure, measured under four-inch pressure, that during this period the defendant had no right to pump any water, and that, during the intervening time, the defendant has the right to pump water from its wells, and carry the same to distant lands for sale and use thereon, to the amount of 125 miner's inches, constant flow. The interveners claim, and were declared entitled to

[64] See Hanson *v.* McCue, 42 Cal. 303, 10 Am. Rep. 299; Southern Pacific R. Co. *v.* Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740; Vanderwork *v.* Hewes, 15 N. Mex. 439, 110 Pac. 567.

On a rehearing of the principal case, the decision was affirmed. 141 Cal. 116, 74 Pac. 766.

claim, solely under the defendant. Judgment was given in accordance with these conclusions. The plaintiff appeals from the judgment upon the judgment roll alone.

The lands of the plaintiff consist of three tracts, designated, respectively, as "blocks 153, 190, and 191 of the Maclay Rancho Ex-Mission San Fernando," according to the recorded plat thereof, and embracing ninety acres. His wells are situated on block 191, which is practically all set out in fruit trees requiring irrigation. Until shortly before this suit was begun he had not irrigated the other tracts. The main controversy concerns the rights pertaining to block 191, but the plaintiff also claims the right to pump water from his wells on that block to irrigate the lands of the other two blocks if he should find it convenient to do so. He did for a short time irrigate fifteen acres of block 190. The plaintiff claims that, upon the facts found, the court erred in limiting at all his right to take water by means of his pumps, and in adjudging to the defendant the right to take water from the adjoining lot by means of pumps, or otherwise than by the natural artesian flow of the wells, or to a greater extent than thirty inches of constant flow. The lands of the plaintiff and a part of block 192 are all situated over the same body of underground percolating water. Concerning this body of water the finding is that underneath all the said lands, and extending to the foot of the mountains, three or four miles northerly thereof, are water-bearing strata of varying depths of sand, boulders, and coarse material, and lying over each stratum is an impervious stratum of clay or cement, extending towards, but not entirely to, said mountains; that across the said strata, and running through the southerly portion of block 192, which lies immediately south of block 191, there is a dyke of material impervious to water; that the subterranean waters in the water-bearing strata are supplied by rains falling on the mountains to the north and east which, descending the surface of the mountain slopes to the base of the mountains, there find their way into the coarse material, and from thence into said water-bearing strata, through which they percolate underneath the overlying strata of clay or cement, and under the lands of plaintiff and the northern portion of block 192, "down to the said dyke, by means of which the movement of the said water is arrested, and the waters impounded, forming a subterranean basin, wherein the said subterranean waters are retained." The seven wells of the defendant are all situated on the part of block 192 north of this dyke, and pierce the said water-bearing strata and subterranean basin. The water pumped therefrom is all taken away to lands lying south of the dyke, a large portion of it being several miles distant therefrom, and none of it overlying the subterranean basin aforesaid. The lands of the interveners lie from two to four miles south of said dyke.

The plaintiff acquired block 191 in 1886, and ever since January, 1887, he and his family have resided thereon. In that year he be-

gan planting orchards thereon and gradually increased the area thereof until 1897. In 1896 he bored five wells along the southern line of the block, and put a pumping plant therein, from which, until the defendant began to pump on block 192 in June of the year 1902, he pumped water to the amount of twenty-five miner's inches for six full days, consecutively, each month, using the same to irrigate said block, and the same being necessary for that purpose. This water was taken into his pumps in the wells at a depth of twenty-four feet below the surface, and it appears from the findings that his wells and pumps, as constructed, can not take the water at a lower depth. He has no other water supply, and the water is, of course, necessary to prevent the destruction of his orchards. In June, 1902, the defendant began pumping from its wells on block 192, over the basin aforesaid, about 125 miner's inches of water, and, until the suit was begun, continued to do so, transporting the water to the distant lands above mentioned and there distributing the same for irrigation and other purposes. Prior to this excessive pumping the water in plaintiff's wells had usually stood at a general level of nine feet below the surface. The consequence of the operation of the defendant's pumps as stated was that, during the remainder of the year 1902, while the pumps were so operating, the level of the water in plaintiff's wells was reduced to twenty-seven feet, and during the year 1903 to thirty feet, below the surface. The trial occurred in May, 1904. At such times as the defendant did not operate its said pumps the water level in plaintiff's wells stood at fourteen feet below the surface in the year 1902, and at sixteen feet in the year 1903. While the defendant is operating its pumps it is impossible for the plaintiff to obtain any water from his wells by means of his pumps.

It is necessary to consider, briefly, certain contracts mentioned in the findings. All the land affected by this action is included in a tract of 20,000 acres, formerly owned by Charles Maclay, from whom all the parties, and all the owners of lands to which the defendant supplies water from its wells, derive title. On September 9, 1885, Maclay conveyed this tract to five trustees, who were to subdivide and sell it. They were to expend, and did expend, $20,000 in subdividing and marketing the land and in constructing dams, reservoirs, and conduits, and in boring artesian wells. In the fall of 1885 they bored the seven wells aforesaid, and obtained an artesian flow of thirty miner's inches of water therefrom, which, with water from other sources, they thenceforth distributed to some of the lands in the tract. From these wells the defendant is now pumping the 125 inches in controversy. In all the deeds made by the trustees, including those to the plaintiff and the interveners, there was a clause reserving to the grantors "all artesian water that may be developed on said land, and not used thereon." The defendant has succeeded to all the rights of the trustees in the water thus reserved. Some importance seems to have been attached to

this reservation in the court below, but we do not think it affects the rights in controversy in the case. It does not extend to the artesian water that may be necessary for use on the land from which it may be obtained, nor to any water except artesian water. It reserved no right to enter on the land to develop artesian water. Conceding that the word "artesian" has the meaning sometimes given to it, and refers to underground water which, by reason of pressure, will rise above its natural level, though not to the surface of the ground, when the stratum in which it lies is pierced by a well, the reservation does not restrict the right of the plaintiff to take such water from the underground strata and use it on his land, situated as it is, over the strata. This is all that the plaintiff claims. The only limitation it would appear to impose is that, where different blocks are obtained by separate deeds, each containing this reservation, it does not, in terms, give the right to take water from the basin by wells situated on one of his blocks and use it upon the other. If the first tract had, and the second had not, underground water of the kind reserved, this would clearly be a substantial violation of the rights reserved. But the plaintiff's respective blocks of land are all situated over the basin in question, and each block is entitled to sufficient water from the basin for the necessary use thereon. The taking of it all by means of wells on one lot, instead of boring wells on each and obtaining for each the necessary water from its own well, would be a mere technical and wholly unsubstantial departure from the terms of the reservation, unless some special injury results from the location of the respective wells. If the pumping by the plaintiff of all the necessary water for his three blocks from the wells on block 191, so near to the defendant's wells, would materially lower the water level in its wells, there might be the substance of an injury to the defendant. But the findings show that the lowering of the water level is caused by the excessive pumping of the defendant, and not by the pumping done by the plaintiff. Even the simultaneous pumping of twenty-five inches by the plaintiff and a considerable quantity by the defendant, the amount not being stated, but presumably as much as the original thirty inches, which was customary prior to June, 1902, did not materially affect the water level. But at all events the most that the defendant could claim is that the plaintiff be required to take upon each block, separately acquired, the water used thereon, if the other method proves injurious.

So far as the use of the water upon block 191 is concerned, the case seems to be within the rule established in Katz *v.* Walkinshaw, 141 Cal. 116, 135, 64 L. R. A. 236, 99 Am. St. 35. In that case it was decided that two owners of separate tracts of land, situated over common strata of percolating water, may, each upon his own land, take, by means of wells and pumps, from the common strata such quantity of water as may be reasonably necessary for beneficial use upon his land, or his reasonable proportion of such water, if

there is not enough for all, but that one can not, to the injury of the other, take such waters from the strata and conduct the same to distant lands not situated over the same water-bearing strata. The court there said: "In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such land owners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of land owners are paramount to that of one who takes the water to distant land; but the land owner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus." In the case at bar the defendant, with respect to its injurious pumping of the water, is in the situation of an appropriator for use on distant land. With respect to plaintiff's block 191, it is attempting to begin such appropriation after the plaintiff has been for many years using the water on his land. Under the rule stated, therefore, the right of the plaintiff to the quantity of water necessary for use on block 191 is paramount to that of the defendant to take the water to the distant land of the interveners and others similarly situated. The defendant is entitled only to take of the surplus after block 191 is supplied.

With respect to plaintiff's block 153, and that part of 190 upon which he has not used the water, but upon which he claims the right hereafter to use it, a question is presented which was expressly left undetermined in Katz *v.* Walkinshaw and which was not therein involved. The plaintiff, with regard to this land, stands in the position of the second class mentioned in the above quotation. The plaintiff, when the defendant began pumping the 125 inches in June, 1902, gave it notice that the pumping was lowering the water level and impairing his rights. The suit was begun in July, 1903, and the facts found by the court show that no estoppel in pais exists in favor of the defendants to prevent the plaintiff from asserting, protecting, and enforcing such rights as he may have to the water for use on blocks 153 and 190. The question is therefore fairly presented whether or not, after an appropriator of water from a common water-bearing strata has begun to take the water therefrom to distant lands not situated over the strata, for use on such distant lands, the owner of other overlying land, upon which he has never used the water, may invoke the aid of a court of equity to protect him in his right to thereafter use such water on his land, and thus prevent the appropriator from defeating such land owner's right, or acquiring a paramount right, by adverse use, or by lapse of time. It appears from the findings that the existence of this underlying water was known before the lands were conveyed to the trustees by Maclay, and that the plaintiff bought his tracts from the trustees because of its situation with respect to that water,

and relying upon said natural water supply, and that without this water the land is of little value. Under these circumstances it does not seem reasonable or just to adopt a rule that would deprive the buyer of such land of the principal benefit of his purchase and the land of its chief element of value. The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, so far as necessary for use thereon, which are paramount to the right of another riparian owner to divert the water to lands not riparian. The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we, therefore, hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff.

In the case of either class of owners of overlying lands, the appropriator for use on distant land has the right to any surplus that may exist. If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such land owner is prepared to use it and begins to do so. It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to water, to prevent another from using it, while he himself does not desire to do so. The established and settled law of riparian rights in running streams, which have become vested rights, may compel a different rule with regard to such waters in some instances, but these rules of law do not, of necessity, control rights in percolating waters. The most that should be allowed in such circumstances is to give a party the aid of the courts to protect his right and prevent the destruction of his source of supply by excessive use or other cause. The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right, and to prevent its ultimate destruction.

The judgment of the court below, with respect to block 191, was apparently based upon the rule established in Katz *v.* Walkinshaw, supra, and was made with the design to allow the defendant to take as much of the water, and no more, as should be compatible with the paramount right of the plaintiff. In view of the findings, however, we think the judgment, in its present form, might eventually prove insufficient for the protection of plaintiff's right. The watershed supplying the underground strata is of limited area, and in some years but little water is contributed to the subterranean

basin, because of the light rainfall. The effect of the defendant's pumping for a period of a little over eighteen months was to lower the permanent water level, as it stood when the pumps were idle, as much as seven feet. By reason thereof the plaintiff is compelled to lift the water seven feet higher than before the defendant began its present appropriation. Perhaps, in view of the extreme necessity for water, and the great benefit derived therefrom, this additional burden upon the plaintiff may not be unreasonable. But if the judgment permitting this pumping by the defendant is affirmed without modification, it will be final between the parties, and the defendant will have a perpetual right to continue the drain upon the limited supply. This climate is subject to occasional periods of several successive years of comparative drought. We have recently had a ten-year period of that kind, which was just closing at the time this pumping of defendant began. It is probable that, if another such period, or even a shorter one, should occur, or possibly with a normal rainfall, the continuous pumping of 125 inches of water from this limited supply will continue to lower the permanent water level of the basin until the plaintiff will be unable to reach it with his pumps. It is not impossible that ultimately the basin will thereby be entirely emptied of water. The findings do not show the quantity of water that will be annually supplied to these underground strata by the average annual rainfall upon the watershed from which it comes. They are silent on this point. It is manifest that, if the quantity taken therefrom exceeds the average annual amount contributed thereto, the underground store will be gradually depleted and eventually exhausted. This should not be permitted. The judgment should be so modified as to provide for or permit the prevention of such a catastrophe, and to limit the amount taken by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall. It should also be framed so as to prevent the lowering of the permanent level to such an extent that the plaintiff will be unable to obtain by his pumps sufficient water therefrom for use upon his lands. These observations apply with equal force to the right of the plaintiff to have the supply protected for future use upon the portion of his lands not hitherto supplied with water. The judgment makes no provision whatever for the protection of the right of these lands to share in the water.

It is therefore ordered that the judgment of the Superior Court be modified by adding thereto, immediately preceding the date line thereof, the following clauses: "(10) Provided, however, that in no event shall the defendant be allowed to take the waters in the strata pierced by its wells, a quantity greater than is supplied thereto from the average annual rainfall upon the watershed contributing thereto, and from other sources; nor shall it be allowed to take therefrom a quantity that will reduce the water level in plaintiff's wells, during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at

the depth of his present pumps, and with equal capacity, will be unable to obtain therefrom enough water to properly irrigate his said block 191 during such period, not exceeding the quantity hereinbefore stated. It is further adjudged and declared that the plaintiff, as the owner of said blocks 153 and 190, has the right to take and use of the said waters underlying said blocks, respectively, a sufficient quantity for irrigation, and other uses thereon, or his due share, in case there is not enough for all equally entitled therefrom, at such reasonable times as it may be necessary and convenient to do so, and that such right is parcel of said lands; that he may take such water through and by means of wells situated thereon, and that he must, when he desires to use the same, give the defendant ten days' notice of the time or times when he will begin such use, and the defendant must thereupon at such times cease pumping its wells for a sufficient time to allow plaintiff to obtain enough water for one irrigation of so much of the particular block as may then require irrigation; that the continued pumping of said water in future by said defendant, as herein permitted, shall not be deemed adverse to the rights of plaintiff herein declared, whether such rights are, or are not, used by plaintiff, and that defendant be forever enjoined from asserting or claiming rights in such waters paramount to those of plaintiff herein declared."

As thus modified, the judgment shall stand affirmed.[65]

We concur: Beatty, C. J.; Angellotti, J.; Sloss, J.; Henshaw, J.; Lorigan, J.

[65] "It is urged that the judgment is erroneous, in that it does not allow the defendant to take water for use upon lot 192 itself. So far as that lot lies over the water supply, the defendant's rights are equal to and correlative with those of the plaintiff. Those rights were not, however, presented to the court, and it does not undertake to adjudicate them. The controversy between the parties was over the question whether the defendant had the right to divert waters from lot 192 to land beyond the dike and not overlying the water-bearing strata. Such diversion was the only use complained of in the complaint, and the pleadings on the part of the defendant and the interveners asserted the right to so divert the waters. At the same time the decree should not have been so broad as to deny to the defendant any right to apply the waters under lot 192 to the use of the land over those waters. Any injury resulting to the defendant in this respect may, however, be obviated by a modification of the judgment. * * *

"It is ordered that the judgment be further modified as follows: (1) By adding thereto, immediately preceding the date line thereof, the following: 'The portions of this judgment restraining the defendant from pumping water from lot 192 are to be construed as limiting its right to pump such water for transportation to and use upon lands lying to the south and west of the dike hereinbefore referred to. Nothing in this judgment is to be construed as limiting or defining the extent of the defendant's right to pump water from said lot 192 at all times for domestic use or irrigation upon the portion of said lot lying to the north and east of said dike.' (2) By striking from paragraph V of said judgment the words: 'by receiving water from any other persons, from any water sources above the said dike; and.' As thus modified, the judgment shall stand affirmed."—Per Curiam on another appeal in same case, 160 Cal. 268, 281-282, 116 Pac. 715, 722.

ON REHEARING.

PER CURIAM: The petition for a rehearing is denied. The modification of the judgment of the Superior Court herein, as ordered in the decision of this court hereinbefore filed, is amended by adding thereto the following additional clause: "Nothing in this judgment shall be construed to prevent the defendant from pumping from its said wells on block 192, at the times when by this judgment it is allowed to pump therefrom, a quantity of water which, when added to the natural flow, if any, of said wells, will equal a flow of thirty inches of water measured under a four-inch pressure, and using the same on distant lands."

MERRICK WATER CO. *v.* CITY OF BROOKLYN.

1898. SUPREME COURT OF STATE OF NEW YORK, APPELLATE DIVISION

32 App. Div. 454, 53 *N. Y. S.* 10

HATCH, J.: The plaintiff is a corporation engaged in the business of collecting water, and selling the same to its various customers throughout the neighborhood where it has its principal place of business. The complaint avers that the land occupied by the plaintiff, and from which it obtains its water supply, is located on a subterranean stream supplied from a water shed which is particularly described; that such underground stream rises to the surface on the plaintiff's land, and flows into ponds owned by it. The complaint further avers that the defendant has acquired a considerable strip of land lying north of the plaintiff's pumping station and its wells, upon which land it intends to sink about eighty wells, and draw therefrom a water supply for the city of Brooklyn, and that, if it carries out such purpose, it will draw the water from the plaintiff's wells and the underground stream, and also from the surface stream and said ponds, whereby the plaintiff will be deprived of its water, its business will be destroyed, and the locality in which it seeks to carry on its business will be checked in its growth. The complaint demands judgment that the defendant be restrained from sinking its wells or establishing a pumping station, or doing any other act upon its land which will diminish the flow of water upon the plaintiff's lands. At the time of the trial the defendant had sunk its wells, established its pumping stations, was engaged in operating the same, and was carrying the water thus obtained to the city of Brooklyn. The proof tended to establish, and referee found, that the effect of the defendant's pumping had been to permanently lower

the water in plaintiff's well from seven to eight feet; that such lowering was caused by the defendant's pumps in drawing the water from under the plaintiff's well and the land on which it is situated. The evidence failed in support of the averment that there existed a subterranean stream of water which supplied the plaintiff's well. Upon this subject the proof was that the interruption, by the act of the defendant, was of percolating water, and as a consequence the water in the well was diminished in quantity, as was the flow of the small surface stream running to the ponds, which was practically, if not entirely, dried up, and the quantity of water in the ponds diminished. The case therefore presents the question of the diversion of percolating water by one corporation from the lands of another corporation, both of which are engaged in the collection of water, not for use upon the land itself, but for purposes of transportation and sale to third persons, who have no interest or right of use of the water as connected with the land. The learned referee has adopted the doctrine of this court as laid down in Smith *v.* City of Brooklyn, 18 App. Div. (N. Y.) 340. That case presented the question of the relative right of the defendant and an adjoining landowner, who made use of his land, and the running stream and pond thereon, in connection with the land, and for the purposes of its beneficial enjoyment. And this court held that as the defendant collected the water upon its land, not for any purpose of beneficial enjoyment of the land itself, but for purposes of transportation and sale at a distant place to others, having no right to it as against the owner of the land, who was deprived of his stream and pond, it was an unlawful diversion of the water by the defendant, for which the plaintiff had his right of action. And we further held that, under the circumstances of that case, the act of the defendant diverted the water from a running stream in which the plaintiff had a property right, and that such diversion was unlawful. But, being mindful of the delicate nature of the question we were deciding, we expressly limited the rule to the particular case and its facts; announcing that no fixed rule could be laid down, but that each case must rest upon its particular facts, as applied to the doctrine of reasonable use and relative rights. The effect of that decision was to limit the right to divert percolating water by an adjoining owner of land to cases where the diversion was produced by the exercise of a legal right to improve the land, or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture, or mining, or by structures for business carried on upon the premises, or other improvements, either public or private. We recognize the rule that no liability was created by such use of the land, even though the effect of it was to divert the percolating water from the land of the adjoining owners. This rule is firmly settled in the law of this state and elsewhere, as appears by the deci-

sions cited upon page 342, 18 App. Div., and page 143, 46 N. Y. Supp., of the Smith case, and is only qualified by the diversion of water from a running stream which has existed from time immemorial. As to it, the maxim, *"Sic utere tuo ut alienum non laedas,"* is applicable, and, from the inherent difficulty resting in the nature of the rights of each party, can only be settled upon the facts out of which the controversy arises. It is therefore manifest that the decision in the Smith case is not controlling of the present controversy. In the present case both corporations seek to obtain water in a similar manner, for a precisely similar purpose; i. e., for transportation and sale. Neither party intends to make use of its land for any other purpose than will facilitate the gathering and distribution of water. In this respect their rights are equal, one as great as the other; and we see no reason why the rule should not be applicable as would apply in case either owner desired to improve its land for purposes of use. Then, as we have seen, neither party would be liable for the diversion of percolating water, because each is engaged in the exercise of a legal right, and the rights of each are equal in the use and enjoyment of the land. When both seek to use their land for exactly the same purpose, and neither seeks to improve it for the purpose of beneficial enjoyment, but to make a profit from the business carried on, the right to such use must also be equal. Under such circumstances, if one gets more than the other we think there can be no more ground of complaint than would exist if both sought to improve their own land, and one secured more than the other, or one was damaged and the other not. As applied to such obligations, the doctrine of reasonable use and relative rights has never been adopted by any of the courts in this state, nor in any other state, so far as our research has discovered, except in New Hampshire. We are not able to see, therefore, that the act of the defendant has infringed upon any legal right which the plaintiff possessed. So far as the diversion of the small brook is concerned, we do not think that the facts warrant its separation from the rule applicable to percolating water. There was little proof to show that its source, character or use was such as to make the rule of the Smith case applicable. It is not every rivulet or small stream to which such rule can be applied, as it is evident, if such were the rule, then an adjoining owner might be unable to improve his property, or might improve, and find himself liable for exercising his legal right. The destruction must be unreasonable when the rights of both parties are considered, and, as applied here, we think it was not sufficient to create a subject-matter of legal damage.

These views call for a reversal of the judgment.

Judgment reversed, and a new trial granted before a new referee to be appointed at special term; costs to abide the event. All concur.[66]

[66] See Merrick Water Co. *v.* Brooklyn, 160 N. Y. 657, 55 N. E. 1097; Stillwater Water Co. *v.* Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541; Erickson *v.* Crookston Water-works, &c., Co., 105 Minn. 182, 117 N. W.

BROADBENT *v.* RAMSBOTHAM ET AL.

1856. COURT OF EXCHEQUER. ENGLAND

11 *Exch.* 602

The judgment of the court was delivered by

ALDERSON, B.: In this case we have been relieved from the consideration of the several pleas justifying the abstraction of the water under the provisions of the Huddersfield Water-works Acts, by the admission very properly made by Mr. Cowling on this argument, that he could not support them; and the questions are now reduced to this one alone, whether the defendant Atkinson has improperly diverted, by the acts which he has undoubtedly done, four sources of water which have, as the plaintiff contends, supplied the Longwood brook on which his mill is situated. There are three of these included in the first count of the declaration, namely, a pond of six and a half acres, a swamp of about sixteen perches, and a well. The fourth is a well, included in the second count. There is no doubt that in the course of the drainage these sources of water have been diverted, and now fall into the drain made by the defendant. The arbitrator describes them thus: "And, first, as to the six and a half acre pond," he says, "from the sides of the hill called Pighill Wood and Pendle Hill the natural flow of water is northward till it reaches Longwood Brook, and all water passing over the lands there naturally runs down towards and into Longwood brook. Above Pighill wood a shallow basin is formed by the land slips, which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill towards Longwood brook. The rest sinks into the ground or remains as a pond in the hollow thus naturally created by the form of the land." Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood brook undoubtedly belongs to the plaintiff; but we think that this right can not extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the

435, 17 L. R. A. (N. S.) 650n; Hathorn *v.* Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436n, 128 Am. St. 555; Hathorn *v.* Dr. Strong's Sanatarium, 55 Misc. (N. Y.) 445, 106 N. Y. S. 553; Pence *v.* Carney, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266, 112 Am. St. 963; Meeker *v.* East Orange, 76 N. J. L. 435, 70 Atl. 360.

natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He can not, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond and to get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that, as to this source of feeding the Longwood brook, the plaintiff has no title. The same may be said of the swamp of sixteen perches, which is merely like a sponge fixed (so to speak) on the side of the hill, and full of water. If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must no doubt exist, it is sufficient to say, that they are not traceable, so as to show that the water passing along them ever reaches Longwood brook. This falls, therefore, into the same category, or rather is a stronger instance of the rule before mentioned. The well at this point is also in *simili casu*. It is not found in the case that it has any subterranean communication with Longwood brook. Indeed, if it had any such communication (inasmuch as the brook seems far below the bottom of this shallow well), the communication would probably draw off all the water in it. It is sufficient, however, to say, that it is not found so to communicate. But no doubt, when this well overflows, the overflow pours itself over and down the declivity towards the brook. But this gives no right to the water, as we have already shown in the case of the six and a half acre pond. These are the three grounds of the plaintiff's complaint in the first count of his declaration. They all seem to us to fail.

We come now to the second count. The stream here said to be diverted is one in which, on the side of a hill, a stream wells out from the ground at a depth of about two feet, and is received into a basin of about three feet square, and used as a watering place for cattle. This stream in dry seasons was somewhat scanty, so as to compel the cattle at those periods to go down on their knees to reach it. At other times it overflowed its basin, and then it ran down part of the way in an open and, as we presume, artificial ditch, for it is described as a ditch beside a hedge. The water lower in its course flows on in a small channel worked by the water and over swampy places where the cattle had trodden in the soil. Still lower down, after passing through one or two fields, it arrives in what is described as a natural valley, and after this it would have probably communicated with Longwood brook, but for its diversion into the

Mill Owners' Compensation Reservoir, which is in fact the same thing.

There is here also, we think, nothing found to take the water from this well out of the same class as the three former cases. We must consider the stream in its beginning, not after it has arrived in the natural valley communicating with the reservoir. If the water, after having arrived there, had been then diverted, the case would be different. The water falling from heaven on the side of a hill, we have before said, may be appropriated, though not after it has once arrived at a defined natural watercourse; and here the question is, whether this water in its first origin, and before it has arrived at any definite natural watercourse conveying it onwards towards Longwood brook, has not been intercepted by the defendant's drain, and so appropriated by him; and we think it has. For what are the facts? The water in dispute is only the overflow of a well, and the well is now prevented from overflowing. But when before it did overflow it run into a ditch (the lowest adjoining ground) made artificially, and for a different purpose, running beside a hedge. This was no natural defined watercourse. After this, it squandered itself over a swamp made by the feet of cattle treading about, and it is not till long after this, that what still remained of it found its way into what may there perhaps be correctly called a definite natural water-course, receiving this and probably other water from other sources also. This part of the case, we think, is wholly undistinguishable from, and is governed by the decision of this court in, the late case of Rawstron *v.* Taylor, ante, p. 369.

This complaint, therefore, fails also. The result is (without going into any question as to this being done by the defendant Atkinson in the rightful exercise of his power of draining his own lands, which probably the pleadings do not raise), that the plaintiff has failed to establish any right to the natural flow of these four streams of water, or any of them, and that on this part of the case our judgment must be for the defendants.

Judgment for the defendants.

CHASEMORE *v.* RICHARDS

1859. ENGLAND. HOUSE OF LORDS

7 House of Lords Cases 349

LORD CHELMSFORD: My lords, the question in this case is, whether the plaintiff in error is entitled to claim against the defendant the right to have the benefit of the rain water which falls upon a district of many thousand acres in extent, and percolates through the strata

to the river Wandle, increasing the supply of water in the river, and being of sensible value in and towards the working of an ancient mill belonging to the plaintiff. The acts of the defendant by which this underground water was interrupted and prevented from finding its way into the river, were done upon his own land.

It was conceded by the plaintiff in argument, that a landowner had a limited and qualified right to appropriate water, the course of which is invisible and undefined, exactly to the same extent and for the same purposes as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and agricultural purposes, and perhaps (it was said) according to the opinion of Chancellor Kent, for the purposes of manufacture also. It must further be admitted (and appeared to be so in argument), that in addition to these direct uses to which the water may be diverted, if, in the regular course of mining operations the percolation of underground water is arrested in its progress, and prevented reaching a point where it would have increased a supply which had previously been usefully employed by an adjoining landowner, he can maintain no action for the loss of the water thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operations upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water. And upon the state of things existing in this case, a further distinction was insisted upon between a party sinking a well in his own land for domestic, or agricultural, or manufacturing purposes, and a public board or a water company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighborhood with water.

Before, however, the plaintiff can question the act of the defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be) he must first establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it, to which each owner may be entitled through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right.

The law as to water flowing in a certain and definite channel, has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Lord Chief Baron Pollock, in Dickinson *v.* The Grand Junction Canal Company, 7 Exch. 300, 301, "that if the course of a subterranean stream were well known,

as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground." But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters can not intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend?

In this case, the water which ultimately finds its way to the river Wandle is strained through the soil of several thousand acres. Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with Mr. Justice Coleridge, I do not see here "how the ignorance" which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, "is material in respect of a right which does not grow out of the assent or acquiescence of the landholder, as in the case of a servitude, but out of the nature of the thing itself." 2 H. & N. 191.

This distinction between water flowing in a definite channel, and water whether above or under ground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In Rawstron *v.* Taylor, 11 Exch. 369, 382, it was held that, in the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the plaintiff's mill. And in Broadbent *v.* Ramsbotham, 11 Exch. 602, it

was decided that a landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill. Baron Alderson, in delivering the judgment of the court in that case says, 11 Exch. 615: "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He can not, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description. This appears clearly to have been the opinion of Lord Chief Justice Tindal and the Court of Exchequer Chamber, in the case of Acton *v.* Blundell, 12 M. & W. 324, 348, for, although the court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the plaintiff, which had been laid dry by the mining operations of the defendant, yet the chief justice having prefaced his judgment by stating, that "the question argued had been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a water-course flowing on the surface," he concludes with these words, 12 M. & W. 353: "We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria,* which can not become the ground of an action."

The Court of Exchequer, in the present case, gave judgment for the defendants without argument, on the authority of the decision in Broadbent *v.* Ramsbotham. The Court of Exchequer Chamber affirmed that judgment, there having been only one dissentient opinion, which, however, pronounced as it was, by a most learned and

able judge (Mr. Justice Coleridge), is certainly entitled to the highest respect. The judges, of whose assistance your lordships have had the advantage, have been unanimous in their agreement with the judgment of the Court of Exchequer Chamber.

Against this concurrence of authority, what is there to be opposed in favor of the plaintiff, but the nisi prius case of Balston *v.* Bensted, 1 Camp. 463, and the case of Dickinson *v.* The Grand Junction Canal Company, 7 Exch. 282? With respect to Balston *v.* Bensted, it does not appear that the question of the right to water percolating through the strata, as contradistinguished from water flowing in a visible stream, was ever presented to Lord Ellenborough's mind, as it is stated, that the defence was intended to be set up, but that he observed, early in the trial, that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it. Whether, by the words "in any particular manner," his lordship meant to point to the right claimed in that case, or intended to state a proposition applicable to all water of which there had been a twenty years' enjoyment, from whatever source it might be derived, it is impossible to gather from the report; but the question was never argued; and as, upon proof that the decrease of the water in the plaintiff's bath had been occasioned by the operations in the defendant's quarry, the case was at once referred, it can hardly be urged as any authority at all upon a point of such importance, and which requires so much consideration as that which it is supposed to have decided.

With respect to the case of Dickinson *v.* The Grand Junction Canal Company, upon which the plaintiff also relied, after the observations made upon it by Mr. Justice Cresswell in the Exchequer Chamber, and by Mr. Justice Wightman in delivering the opinion of the judges to this house, it is unnecessary for me to say more than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point now under consideration. It appears to me, that reason and principle, as well as authority, are opposed to the claim of the plaintiff to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the river Wandle, and, that, therefore, the judgment of the Court of Exchequer Chamber ought to be affirmed.

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LORD WENSLEYDALE: My lords, this case is of the greatest importance, and requires the most full and attentive consideration. No question that has occurred in my time has been so worthy of the most careful examination; and though we have had a very able argument at the bar from the learned counsel, and we also have been favored with the able and unanimous opinion of six of the judges, pronounced by Mr. Justice Wightman, I must own, speaking for myself, I should still desire further discussion, as I have felt very

great difficulty in coming to a conclusion satisfactory to my mind; so many difficulties present themselves on both sides.

As, however, my noble and learned friends who heard the case argued at the bar have not had the same difficulty in deciding that I have, and acquiesce in the propriety of the case being now disposed of, I concur, though not without very serious doubts as to the propriety of the conclusion at which they have arrived.

Besides the opinion of the learned judges, delivered by Mr. Justice Wightman, Baron Bramwell has had the goodness to communicate to me one which he wrote, at the time when I suppose a difference of opinion was expected, and I am much indebted to him, as the subject is discussed by him with much ability.

Your lordships have, for the first time, to decide the question as to the rights to underground water. There are two conflicting authorities: the case under appeal, and that of Dickinson *v.* The Grand Junction Canal Company, 7 Exch. 282, and your lordships have to decide between them.

* * * * * *

The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae,* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbor.

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The observations, also, of Lord Chief Justice Tindal in the case of Acton *v.* Blundel, 12 M. & W. 324, and of Mr. Justice Maule in Smith *v.* Kenrick, 7 C. B. 515, as to the origin of the right to the continual flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, and which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean water-courses can not be supported.

Now the right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex natura,* and an incident to the land itself, as a beneficial adjunct to it, as was determined in the case of Wood *v.* Waud, 3 Exch. 748.

If the river Wandle in this case had been supplied by natural streams flowing into the river above ground, or in known definite

channels below ground, the cutting off those streams to which the person entitled to the use of the river was entitled *ex natura* as feeders of the river, would be an injury to him, and give a right of action. And if this be true with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulets, and the drops of water which flow and percolate into and supply the river. They are all equally the gifts of nature for the benefit of the proprietors of the soil through and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil, any more than the property in the water of a river which flows through it on the surface.

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What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterraneous waters can not be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbor's land of moisture, and even tap a copious spring, and prevent it from flowing to his neighbor's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbor, especially as the precise course and direction of such water can seldom be known accurately beforehand.

In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbor's land.

In the civil law are to be found many instances in which it is allowed to cut off subterraneous supplies, if it is done in the cultivation of the soil. In the Digest, Dig. 39, 3, 1, sec. 12, Pothier's ed. 1782, vol. 3, p. 20, it is said, "*Denique Marcellus scribit; Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo. Et sane actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*" And a very extensive sense is given to these words, authorizing the improvement of the proprietor's own land, in the civil law. In the same book of the Digest, "*De aqua et aquae pluviae arcendae,*" Dig. 39, 3, 1, sec. 9, Pothier's ed. 1782, vol. 3, p. 21, it is said that the making a work "*agri colendi causa et frugum querendarum causa,*" and thereby altering the course of the "*aquae pluviae,*" is not actionable. The term "*fruges*" is said to

be the same as rent, "*Frugem pro reditu appellari, non solum quod, frumentis aut leguminibus; verum et quod ex vino, sylvis caeduis, cretifodinis, lapidicinis, capitur.*" It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating, in order to get the minerals in any place, it would be deemed by the Roman law to fall within the principle of the improvement of the land, and not be actionable.

The case of Acton *v.* Blundell would be rightly decided upon this ground, because the injury to the plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his land; and unless he had that right, the public would have lost the benefit of a valuable gift of Providence.

We come then to the conclusion, that every man has a right to the natural advantages of his soil—the plaintiff to the benefit of the flow of water in the river and its natural supplies, the defendant to the enjoyment of his land, and to the underground waters on it, and he may, in order to obtain that water, sink a well. But according to the rule of reason and law, "*sic utere tuo ut alienum non laedas,*" it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbor's rights as may be. The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbor, *animo vicino nocendi.* The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden "if done *in aemulationem vicini,*" Bell's Principles, sec. 966; but this principle has not found a place in our law.

The question in this case, therefore, as it seems to me, resolves itself into an inquiry, whether the defendant exercised his right of enjoying the subterraneous waters in a reasonable manner. Had he made the well and used the steam engines for the supply of water for the use of his own property, and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint. But I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighborhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighboring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the defendant could have dug a well himself on his own land, and taken the like quantity of water, so that the defendant may have taken much more than would have been abstracted if each had exercised his own right.

The same objection would not apply to the abstraction of water for the use of the dwellers on the defendant's land, even though they carried on trades requiring more water (breweries, for example) than would be used for mere domestic purposes; it would still

be for their purposes only. But in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the defendant's land.

On the whole, I should certainly have wished to give this important case further consideration; but, as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your lordships to reverse the judgment.

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Judgment of the Court of Exchequer Chamber affirmed, with costs.

GRAND JUNCTION CANAL COMPANY *v.* SHUGAR

1871. ENGLAND. BEFORE THE LORD CHANCELLOR

L. R. 6 *Ch. App.* 483

This was a suit to restrain the defendant, representing the local board of health of Tring, from diverting certain water.

In pursuance of powers given by their acts, the Grand Junction Canal Company many years ago intercepted a stream flowing from the Silk Mill pond, near Tring, and caused the water to flow into a branch of the canal at a high level. The local board had lately made a drain near and below the Silk Mill pond. It was not disputed that this drain and other works of the local board had lowered the water in the Silk Mill pond, and that the water now came out at a lower level, and had to be pumped up by the plaintiffs, but there was a considerable conflict of evidence as to the manner of the interference.

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The plaintiffs produced evidence that if the drain made by the local board had been constructed in a different way, the leakage from the stream would have been avoided, and that even now it might be avoided, which was denied by the local board and their witnesses. In the view which the lord chancellor took of the evidence, it was established that some of the water flowing in the stream was withdrawn by the action of the drain. Before the works were begun, and during the progress of the work, the company warned the local board of the damage which they were likely to do, and had been assured by them that when the works were completed the company would have no cause for complaint.

The master of the rolls refused to grant an injunction, and dismissed the bill, without prejudice to the plaintiffs proceeding for compensation by action at law, and under the local board acts.

The plaintiffs appealed.

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LORD HATHERLEY, L. C., after stating the facts of the case, as in his opinion showing that the local board, by the drain in question, had drawn off the subterranean springs, and in so doing had also drawn off the water from the running stream, continued:

Now, as regards the law of the case, I should think it beyond dispute after Chasemore *v.* Richards, 7 H. L. C. 349, 5 Jur. (N. S.) 873. Mr. Justice Wightman there laid down the law very plainly in giving the opinion of the judges upon the subject, and the distinction was there drawn—and, I should have thought, firmly established—between water which comes no one knows exactly whence, and flows no one knows exactly how, either under ground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel. When I say "once," of course I mean for such a period of time as that there can be no difficulty raised with reference to the rights of the parties. [His lordship then read the judgment, 7 H. L. C. 366.] These few words contain all that need be said on the subject.

So one of the learned judges, in Acton *v.* Blundell, 12 M. & W. 324, said, that where a well had been made to receive underground water, and another man had made a well which took away the water from the first well, he has as much right to use the soil as the digger of the first well. A man can not compel his neighbor to leave his own soil untouched, and prevent his having a well too. But, as regards flowing water, the case is quite different. He who is entitled to flowing water has simply the enjoyment of the water as it passes him, and, having passed him, it is transmitted to another, who has also a right of using it only for his own limited purpose, and he has a right to have it always coming to him to use for that limited purpose.

The point most closely pressed on me by Mr. Eddis and Mr. Lindley was this—how can you distinguish the case of a well where the water has been secured from the case of this running water? That is answered at once by the decision in the case of Chasemore *v.* Richards, 7 H. L. C. 349, 5 Jur. (N. S.) 873, and the distinction is plain. If you are simply using what you have a right to use, and leaving your neighbor to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local board have made. As far as regards the support of the water, all one can say is this: I do not think Chasemore *v.* Richards, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate under ground; but that has no bearing at all on what you may do with regard to water which is in a defined

channel, and which you are not to touch. If you can not get at the underground water without touching the water in a defined surface channel, I think you can not get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbors also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity. That appears to me to be clearly the course which the local board have taken, and, therefore, they have clearly and plainly given ground for the injunction.

ENGLISH *v.* METROPOLITAN WATER BOARD

1907. ENGLAND. THE KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE

L. R. 1907—1 *K. B.* 588

Trial before Lord Alverstone, C. J., without a jury.

In the year 1900 the Kent Water-works Company, who were the predecessors in title of the defendants, acquired by agreement certain land in the parish of Darenth, in the county of Kent, for the purposes of a pumping station. Through this land there runs a brook, which rises some 300 yards to the south of the southern boundary of the land, its source being springs of considerable volume which rise from the chalk to the surface, and it flows down a defined channel until it reaches a mill about half a mile to the north of the defendants' land and thence finds its way into the River Darenth. The plaintiff is the owner of certain land situate immediately to the north of the defendants' land, his land being bounded for a distance of eighty yards by the brook in question. The Kent Water-works Company having acquired the land above mentioned, sunk thereon, at a distance of about sixty feet from the bank of the brook, a well to the depth of 110 feet, the well being lined with steel cylinders from the top downwards to a depth of seventy-six feet, with the result that no water could find access to the well from the adjoining soil at a less depth than seventy-six feet. They also, with the object of increasing the volume of water coming to the well, sunk at a distance of 131 feet from the well a bore hole 250 feet deep. This bore hole was lined with steel tubing down to a depth of ninety-one feet, at which depth the tube was plugged. The bore hole was connected with the well at a depth of 101 feet from the surface by means of an adit six feet high by four feet wide. Over the well the company constructed a pumping station and erected machinery. In 1902

they commenced to pump. In the same year the undertaking of the Kent Water-works Company, including the Darenth pumping station, was by virtue of the Metropolis Water Act, 1902, 2 Edw. 7, ch. 41, transferred to the defendants. Previously to the commencement of the pumping operations the brook, which flowed with a considerable volume of clear chalk water, and according to the evidence of the plaintiff's witnesses was never dry, winter or summer, afforded a good spawning bed and breeding ground for trout. Since, and in consequence of, the pumping operations by the defendants the quantity of water flowing down the brook past the plaintiff's property was substantially diminished, and in the year 1906, for a period of six weeks, it was practically dry opposite the plaintiff's land. It was admitted by the defendants that the effect of the pumping was to lessen the quantity of water leaving the northern boundary of the defendants' premises, as compared with that entering their southern boundary, by at least 16,000 gallons a day, and that amount of diminution was, as the Lord Chief Justice held, sufficient to give the plaintiff a cause of action, unless it was justifiable. None of the water, however, which had once been in the brook from its source 300 yards south of the defendants' premises down to their northern boundary, in fact got into the defendants' well or was pumped up by them. The diminution of the water in the brook as it left the northern boundary of the defendants' premises was due to the general fall in the level of the water in the subsoil, or, in other words, to the withdrawal of the support of the body of underground water. * * * During the whole of the time that the pumps were running between December 12 and January 8, and subsequently to January 15, the quantity pumped was 1,750,000 gallons per day. This enormous quantity of water was derived, not from the surface water, but from a vast underground body of water flowing through the fissures of the chalk from south to north, and the abstraction or diminution of the water in the bed of the stream from its source down to the point where it leaves the plaintiff's land was due to the fact of the defendants' pumping slightly lowering the height of the subsoil water. Moreover, a chemical analysis of the water pumped up by the defendants showed it to be a water of exceptional purity, without any trace of admixture of surface water.

The action was brought by the plaintiff as a lower riparian owner, the main ground of complaint being that the brook was in consequence of the defendants' pumping rendered valueless as a breeding ground for trout. He claimed damages and an injunction.

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LORD ALVERSTONE, C. J.: * * * This conclusion brings me finally to the difficult question, Does the abstraction of water under the circumstances which I have already found to be estab-

lished by the evidence in this case establish a cause of action by the plaintiff?

The case mainly relied upon by the plaintiff was Grand Junction Canal Co. *v.* Shugar, L. R. 6 Ch. 483, the result of which, as stated in the head-note, was that "although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land." This head-note does not sufficiently explain what is meant by the words "drawing off." Mr. Atkinson contended that any act of the defendants which caused a diminution of the volume of water which had once got into the body of the stream above the plaintiff's land was a "drawing off" within the language of Lord Hatherley. The passage he relied upon is as follows: "As far as regards the support of the water all one can say is this: I do not think Chasemore *v.* Richards, 7 H. L. C. 349, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel and which you are not to touch. If you can not get at the under-ground water without touching the water in a defined surface channel, I think you can not get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbors also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity." If these words are to be taken in their full and literal meaning they clearly establish the proposition for which Mr. Atkinson contends. In my opinion, however, at any rate in this court, it is not open to me to put so wide a construction upon them. That case received a good deal of consideration in the case, already cited, of Jordeson *v.* Sutton, etc., Gas Co., [1899] 2 ch. 217. I have myself examined the report of Grand Junction Canal Co. *v.* Shugar, L. R. 6 ch. 483, in the Law Times, 24 L. T. 402, and I agree, if I may respectfully say so, with the view of that case taken by Vaughan Williams, L.J., that Lord Hatherley treated Shugar's case, L. R. 6, ch. 483, as one in which there was direct tapping of an overground stream flowing in a defined channel, and not merely percolating water indirectly affecting the surface stream. It is quite true that Vaughan Williams, L.J., was the dissenting judge, but I do not understand Lindley, L.J., to have differed from the law laid down upon this part of the case. Lindley, L.J., came to the conclusion, [1899] 2 ch. 239, that that which caused damage to the plaintiff was the disturbance and removal of wet sand and not of some under-

ground water, and the same view was adopted by Rigby, L.J., Ibid. p. 242, where he likened the case to the removal of loose soil which will fall down when the lateral support of similar soil is removed, rather than to that of water which may draw away other water; and it is in my judgment significant that neither Lindley, L.J., nor Rigby, L.J., relied upon or even referred in their judgments to Grand Junction Canal Co. *v.* Shugar, L. R. 6 ch. 483, although it had been discussed in argument. I desire to say that if I had been satisfied that the defendants, by their operations, had directly drained or tapped water from the brook which would otherwise have flowed past the plaintiff's property, I should have applied the principle of the judgment in Shugar's case, L. R. 6 ch. 483, and have given effect to the opinion which I expressed in delivering judgment in Salt Union *v.* Brunner, Mond & Co., [1906] 2 K. B. 822, that the abstraction of water or soil by the direct act of an adjoining proprietor may afford ground for action; but, having regard to the judgment of the Exchequer Chamber in Popplewell *v.* Hodkinson, L. R. 4 Exch. 248, and for the reasons which I have given, I am of opinion that abstraction or diminution of quantity by the withdrawal of support does not come within the same principle.

Among the cases in which this question has been dealt with there is, of course, the case of Chasemore *v.* Richards, 7 H. L. C. 349, the effect of which I take to be as stated by Cotton, L.J., in Ballard *v.* Tomlinson, (1885) 29 ch. D. 115, 123: "Now Chasemore *v.* Richards, 7 H. L. C. 349, simply decided this, as I understand it, that every man has a right to take all the underground water (by which I mean water going in no definite channel) which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbor will have no underground water in his own land or that the stream which he owns will be diminished in consequence of the under-ground water which had been so appropriated not coming into that stream." It is to be noted, however, from the last words of this passage, "not coming into that stream," that Cotton, L.J., does not deal directly with the point on which the plaintiff relies, namely, that in this case, to use the Lord Justice's words, the water had come into the stream before the operations of the defendants diminished its quantity; but, notwithstanding the comments upon it by Rigby, L. J., in Jordeson's case, [1899] 2 ch. 217, 242, 243, it seems to me that Popplewell *v.* Hodkinson, L. R. 4 Exch. 248, does decide that if the case is not one of direct abstraction, but of the withdrawal of support of subterranean water, no action can be maintained. The reasoning of Rigby, L. J. [1899] 2 ch. 217, 242, 243, seems to me to show that he recognized that Popplewell *v.* Hodkinson, L. R. 4 Exch. 248, did decide that dealing with the question of support as distinguished from direct abstraction, no action lies against the adjoining owner who lowers the level of the sub-soil wa-

ter, and this view is clearly expressed by Vaughan Williams, L.J., [1899] 2 ch. 217, 247, and there is nothing in Bradford *v.* Pickles, [1895] A. C. 587, which tells against the view which I have expressed. In the earlier part of my judgment dealing with the facts, I have found as a fact that no water from the brook gets into or is pumped by the defendants' well, and that the only effect of the defendants' pumping is to lower the level of the sub-soil water underneath and at the sides of the brook from ten to twelve inches, with the result no doubt that this does cause a diminution in the quantity of the water passing the plaintiff's land; but this is a consequence of the withdrawal of support, and of that alone.

For these reasons I have come to the conclusion that, although the defendants are not expressly protected by statute, no action can be maintained against them by the plaintiff in respect of the abstraction of water. I have only to add that, had I taken another view of the case, it clearly is not in my opinion one for injunction. The damage occasioned by the abstraction of the water in the past is comparatively trifling, and under no circumstances should I have assessed the damages for its abstraction at more than 50*l.*

Judgment for the defendants.[67]

COHEN *v.* LA CANADA LAND AND WATER CO. ET AL.

1904. SUPREME COURT OF CALIFORNIA

142 Cal. 437, 76 Pac. 47

MCFARLAND, J.: This is an action to have it adjudged that plaintiff is entitled to the use of certain water, to recover damages for alleged diversion thereof, and to enjoin defendants from diverting the same; and the main issue in the case is whether or not the defendants had the right to destroy or materially diminish the flow of water from certain flowing springs belonging to plaintiff by means of tunnels dug by defendants near and under said springs. The judgment of the court below, although nominally in favor of plaintiff as to some matters, was substantially in favor of defendants on the said main issue. Plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

At the time of the commencement of the action, and at the time of the alleged wrongful acts of defendants, plaintiff was, and for many years prior thereto she and her predecessors in interest had been, the owners of certain described land through which there runs a ravine or canyon called "Snover Canyon." This land is to a large extent agricultural in character, and has been culti-

[67] See Popplewell *v.* Hodkinson, L. R. 4 Exch. 248.

vated by plaintiff and her predecessors in orchards, etc.; and upon it they have a large house, called "Gould's Castle," with flower gardens, ornamental trees, etc. In Snover canyon there flows a small stream of natural water which was used by her and her predecessors to irrigate their orchards, and which is necessary to their maintenance, and for domestic purposes at such house. This stream is fed to a considerable extent by certain flowing springs, some of them along the thread of the stream, and others a little above in the banks, the waters of which flow in a well-defined stream down into the canyon. These springs, or at least most of them, are situated a little above the upper line of plaintiff's land. But about 1891, when the land on which they are situated was United States unappropriated public land, plaintiff's predecessors appropriated the waters of the springs, and carried them by pipes, etc., to the said house and orchard, and used them there for domestic and irrigating purposes. The court found that such appropriation had been made, and had not been abandoned, and that "plaintiff is entitled to use all of the water flowing from said springs, or that may hereafter flow from said springs, or that may flow in any stream down Snover canyon, and defendants are not entitled to use of such water flowing from said springs, or that may flow in said stream." In the latter part of 1898 and the early part of 1899 the defendants went upon the land where these springs are, with the consent of those who then owned that land, and dug several tunnels at, near and under said springs; and the effect of these tunnels clearly was to entirely dry up some of the springs, and to greatly diminish the flow of water from the others. The water obtained by defendants by and through these tunnels is not used, nor intended to be used, by them for the benefit of the land on which the tunnels were dug, but is taken to other and nonriparian lands for sale. The court found "that part of said waters which were developed in said tunnels would, except for said tunnels, find its way by some unknown subterranean means to said springs, and be discharged therefrom." But it also found that "neither of said tunnels intercepted any known stream of water running in any defined channel," and "that said springs are not, nor is either of them, fed by any known stream running in a defined channel"; and for these reasons the court held, in substance, that the loss to plaintiff consequent upon the destruction of the springs, or the diminution of the quantity of water flowing therefrom caused by defendants' tunnels, was *damnum absque injuria,* and without remedy. This view taken by the learned judge of the court below, no doubt, was to a great extent justified by the somewhat uncertain condition of the law on the subject at the time of the trial of this cause. There was then considerable authority to the point that under-ground water, not shown to be in the form of a subterranean "stream," but merely "percolating,"

was a part of the soil, and could be removed by the owner of the land, at his pleasure, without consideration of the adjoining proprietors, although there was not much authority to the point that he could take it entirely away from the land for commercial purposes elsewhere. But since the trial of the cause in the court below it has been definitely settled by this court, in Katz *v.* Walkinshaw, 141 Cal. 116, and subsequent cases, that the question whether one can maintain an action for deprivation of the use of the water by the act of another does not depend upon the fact that the deprivation was caused by the tapping or intercepting of a known stream running in a defined channel, either on the surface or under ground. In such an action it is sufficient for the plaintiff to show that wrongful acts of the defendant complained of did actually deprive plaintiff of water to the use of which he was legally entitled; and, if these acts consisted of sub-surface excavations, it is not necessary for the plaintiff to show that a well-defined subterranean stream had been intercepted, or to show the particular subterranean conditions which were disturbed, provided it clearly appears that the acts of the defendant caused the destruction or diminution. And it has been established by these cases that the right of an owner of land to use water percolating therein is a right only to a reasonable use thereof for the benefit and enjoyment of his land, and subject to the maxim, "*Sic utere,*" etc., and does not include the right, by excavations, to diminish the flow of water to others, where the diversion is not for a reasonable use on his own land. It would be useless to restate the principles and reasoning by which these conclusions are established. They are fully stated in both the opinions in Katz *v.* Walkinshaw—the one by Temple, J., 141 Cal. 138, and the other by Shaw, J., 141 Cal. 120. In the recent case of McClintock *v.* Hudson, 141 Cal. 275, the facts there being very similar to the case at bar, the subject is again somewhat elaborately discussed; and the court, among other things, said: "The case of Katz *v.* Walkinshaw, decided November 28, 1903, 141 Cal. 116, establishes a rule with respect to waters percolating in the soil which makes it, to a large extent, immaterial whether the waters in this land were or were not a part of an under-ground stream, provided the fact be established that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream. By the principles laid down in that case, it is not lawful for one owning land bordering upon or adjacent to a stream to make an excavation in his land in order to intercept and obtain the percolating water, and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream, and causes damage to parties having rights in the water there flowing." As the court below decided this case upon a theory opposed to the one above stated, it, no doubt, did not consider itself called

upon to be very careful about making findings which would have been necessary to a judgment upon plaintiff's theory; and the findings are not full and specific enough to warrant this court in ordering a judgment for plaintiff. We can therefore only render a judgment of reversal. It will be the duty of the court below to find specifically to what extent, under the views of the law hereinbefore expressed, the defendants have by their said tunnels and excavations diminished the flow of the water through the said springs, and to render judgment in favor of plaintiff for such damages and injunction as the facts found may show to be proper.

The judgment and order appealed from are reversed.[68]

We concur: Lorigan, J.; Henshaw, J.

HUDSON ET AL. *v.* DAILEY ET AL.

1909. SUPREME COURT OF CALIFORNIA

156 *Cal.* 617, 105 *Pac.* 748

SHAW, J.: The plaintiff Victoria Hudson alleges: That she is the owner of 760 acres of land in the Rancho de la Puente, that said land is riparian to a stream of water known as "San Jose creek" and is entitled to riparian rights therein, and to receive of its waters for use thereon a flow of 250 miner's inches of water; that the water of said stream is directly supplied to it from the saturated soils and gravels of the valley through which it runs; that the defendants have bored a number of wells in said valley from which, some by artesian pressure and some by pumps but all without right, they obtain large quantities of the waters which feed said creek and appropriate the same to their own use, thereby depleting the stream flowing in the creek to the extent of 300 miner's inches, and depriving the plaintiff of the waters thereof; and that they claim the right to continue this use of the waters lying beneath their lands. She prays for a decree quieting her title to 250 miner's inches of water of the creek, and enjoining the defendants from pumping and using the water of said wells to an extent that will prevent a sufficient flow of water in said creek to supply her with said quantity therefrom. The plaintiff J. W. Hudson is the husband of Victoria, and

[68] See Cohen *v.* La Canada Land & Water Co., 151 Cal. 680, 91 Pac. 584; McClintock *v.* Hudson, 141 Cal. 275, 74 Pac. 849; Bartlett *v.* O'Connor, 102 Cal. xvii, 36 Pac. 513; Gould *v.* Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. 201; Strait *v.* Brown, 16 Nev. 317, 40 Am. Rep. 497; Bruening *v.* Dorr, 23 Colo. 195, 47 Pac. 290, 35 L. R. A. 640; Meyer *v.* Tacoma Light and Water Co., 8 Wash. 144, 35 Pac. 601; Dement Bros. Co. *v.* City of Walla Walla, 58 Wash. 60, 107 Pac. 1038; Verdugo Canon Water Co. *v.* Verdugo, 152 Cal. 655, 93 Pac. 1021.

has no interest in the suit. In this opinion, when we mention the plaintiff, we refer to Victoria. The answer denies many of the material allegations of the complaint. Defendant Currier answers separately, making the additional defense that the plaintiffs' action is barred by the statute of limitations. The action was begun on November 30, 1904. The findings are very full and elaborate. The conclusion of law and judgment was that the plaintiffs take nothing by the suit. A motion for a new trial was denied. The plaintiffs appeal from the judgment and order.

The appellant urges that the findings of the court are, in many particulars, contrary to the evidence. We do not find it necessary to consider all of these specifications in detail. We are of the opinion that, upon a proper view of the case as presented in the court below, all the findings that are necessary to support the judgment are sustained by the evidence.

San Jose creek, in its original natural state, had its origin in the Sierra Madre mountains, from whence it then flowed on the surface of the ground through the plain upon which the city of Pomona is now situated and to and through the San Jose valley. For many years, however, owing to the diversion and use of the water in Pomona and vicinity, there has been no surface stream in the channel from its embouchure from the mountains down to the upper part of the San Jose valley, at which point the stream again appeared on the surface and flowed down to the lands of the parties here concerned. It is the theory of the plaintiff that the greater part of the water of the stream, thus rising in the valley, is composed of water which comes from the mountain streams and sinks into the underlying porous strata extending from the foot of the mountains to and into the San Jose valley and under the lands of the defendants, and which, owing to the narrowing of said valley at its upper end and the consequent elevation of the water plane at that point, rises to the surface and flows in the depression constituting the channel of the creek. Accepting this as correct, the defendants claim that the plaintiff has shown no legal injury, no invasion of her rights, and no ground for relief. The evidence shows that her theory is correct in the main. Some of the water, thus percolating through the underlying strata, comes from rainfall upon the adjacent hills and upon the valley itself and the plain above in the vicinity of Pomona; but this fact does not affect the relative rights of the parties to the water.

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Each defendant owns a separate tract of land in severalty. All of these lands, except those of Currier, lie within the valley and over the underground porous strata from which the creek issues. Each of these defendants, by means of wells and pumps, takes water from the strata and uses it upon his tract of overlying land. These are the diversions complained of and shown by the evidence. These, coupled with other similar diversions and uses in Pomona and

vicinity and a series of ten unusually dry years immediately preceding the action, have caused the stream flowing upon the surface in the creek to diminish to such an extent that, at the plaintiff's place of diversion from the creek, the flow is much less than it was formerly and she is thereby deprived of the use of the quantity of water which, for thirty years previously, she had been accustomed to use.

The court found that none of these defendants takes or uses more water in this way than is necessary for irrigation and domestic use on his particular tract of land. In her briefs the plaintiff practically concedes that this finding is correct. There is no direct evidence to show whether or not the underground supply is insufficient for all demands upon it. If we concede that the circumstances show that it is not sufficient for all, we are then met by the proposition that there was no evidence to prove that said defendants, or any of them, have ever taken more than a reasonable share of such water. The plaintiff tendered no issue of that character. The complaint asserts a paramount right in the plaintiff, superior to that of the defendants. There is no attempt to present a case of excessive use by a defendant entitled to share in a common supply, or to obtain a decree apportioning the waters of the valley among the parties. The evidence does not supply the data necessary to apportion the water to which each party is entitled. If these defendants are entitled to a reasonable share of this underground water, the plaintiff has shown no case against them.

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It appears, however, that the lands of all defendants except Currier are situated over the strata from which they obtain water and from which the creek is also supplied. The irrigated lands of the plaintiff are over the same strata. Defendants' lands are far above the plaintiff's place of diversion from the surface stream, and they use the water only upon their overlying lands. The general rule, as now established by the decisions of this court, undoubtedly is that, where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of the other. Katz *v.* Walkinshaw, 141 Cal. 134, 144, 150, 64 L. R. A. 236, 99 Am. St. 35; McClintock *v.* Hudson, 141 Cal. 281; Cohen *v.* La Canada, etc., Co., 142 Cal. 439; Montecito, etc., Co. *v.* Santa Barbara, 144 Cal. 585; Burr *v.* Maclay, 154 Cal. 434; Barton *v.* Riverside Water Co., 155 Cal. 509. Applying this rule, and assuming for the present that the right of the plaintiff is not paramount to that of the others, there can be no doubt that the taking of a part of the underground waters by the defendants is not unlawful, unless they take an unreasonable share thereof. As there is no presumption

that the part so taken by any defendant exceeds his reasonable share, it would be incumbent upon the plaintiff to prove it, and, as she had made no attempt to do so, she can not prevail against them. She insists, however, that her right is paramount to that of the defendants to the use of these underground waters. Her land, or the part of it upon which she uses the water, is riparian to the creek. She, and her predecessors in interest, by means of a dam and open ditch, have diverted the water from the creek at a point below any of the lands of the defendants, and have used it upon her land ever since the year 1868, under claim of right, to the extent of about 250 miner's inches, whenever the stream was large enough to furnish that amount. The diversions of the defendants by their wells have materially contributed to the diminution of the surface stream, and have, to that extent, deprived her of the water to which she is entitled, if her right is superior to theirs. The question is thus presented whether or not the rights of a riparian proprietor, to the waters of a stream, extend to the subterranean waters above from which the stream proceeds, and are paramount to that of the owners of the lands which overlie those subterranean waters.

If the water in the underground strata is in such immediate connection with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, then the defendants' lands overlying such water must be considered as also riparian to the stream, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water. In that case her use would not be adverse to them. They would not lose their right by disuse, and their taking of a reasonable share would be lawful. Coleman *v.* Le Franc, 137 Cal. 217. In Verdugo, etc., Co. *v.* Verdugo, 152 Cal. 664, a different rule was applied because in that case the right of the party taking the surface stream was paramount to the right of the other riparian owners along its course. It was made paramount by the force of a decree in partition setting apart the surface stream to the use of a particular tract of the land, exclusively, and consequently divesting the other lands of all right to the stream and giving the person owning the land to which it was assigned the right to have its flow preserved undiminished. The rule which in that case was declared to apply to such of the underground waters as might prove to be unnecessary to the preservation of the surface stream—that is, that all the parties having access to it would have the right to share reasonably in its use—is the rule applicable to the case at bar, if plaintiff has no paramount right. But the plaintiff insists that, by continuous use since 1868, she had gained a prescriptive right to the water of the stream, which, she claims, is paramount to said rights of the defendants, at least to the extent that they may not extract the underground water in such quantities as to deplete the surface stream to her injury. If this water is a part of the stream, this claim is also untenable. The defendants, as riparian owners, would not lose their rights by disuse. Her use of the water, after it

had passed through their lands and become part of the surface stream, would not injure them, nor constitute a trespass upon their property, and hence it would not be adverse to them and could not be the foundation of a title by prescription as against them. Hargrave *v.* Cook, 108 Cal. 78, 30 L. R. A. 390; Bathgate *v.* Irvine, 126 Cal. 140, 77 Am. St. 158; Cave *v.* Tyler, 133 Cal. 568.

There is also a claim that this underground water, as to a great part of the lands, has not the characteristics of a stream, but must be classed as percolating water. There will always be great difficulty in fixing a line, beyond which the water in the sands and gravels over which a stream flows, and which supply or uphold the stream, ceases to be a part thereof and becomes what is called "percolating water." Undoubtedly, the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water. It is therefore important to determine the relative rights of the owner of the nonriparian land containing percolating water, which feeds a surface stream, and those who have acquired riparian or prescriptive rights in said stream, where the pumping of such percolating water and its use on the land in which it is found will diminish the surface stream, to the injury of those having such riparian or prescriptive rights therein. The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, "*Sic utere tuo ut alienum non laedas.*" It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to reasonable share thereof, as against other riparian owners thereon. We think the same application of the principles should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface streams supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in

this common supply of water would therefore be coequal, except as to quantity, and correlative.

There is nothing in the facts alleged or proved giving to the plaintiff any paramount or superior rights in these waters. There is no evidence that she had ever used or diverted the water in such a manner as to interfere in any way with the use of the percolating water by the defendants or so as to make her use adverse to them and give her a prescriptive right against them for the amount she was accustomed to use. She and they alike must depend solely on their natural rights for the determination of the quantity they may take from this common supply. As she has failed to allege that they have taken or threaten to take more than a reasonable proportion of the water, and as she had no right superior to theirs, she has not established a cause of action against them with respect thereto.

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The judgment and order are affirmed.

We concur: Henshaw, J.; Sloss, J.; Lorigan, J.; Angellotti, J.; Melvin, J.

MILLER *v.* BAY CITIES WATER CO. ET AL.

1910. SUPREME COURT OF CALIFORNIA

157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772

LORIGAN, J.: Plaintiff, the owner of a tract of land in Santa Clara county upon which was planted an orchard or twenty-one acres of deciduous trees, brought this action against the defendant, a California corporation organized for the purpose of furnishing water to cities and their inhabitants, and against certain of its officers, to enjoin the diversion by them of any waters of the Coyote river in said county, either those waters flowing on the surface of the bed of said river, or flowing or percolating underneath it, or from diverting any of said waters to any extent. * * * Plaintiff had a decree as prayed for, and defendants appeal therefrom, and also from an order denying their motion for a new trial.

Upon the issues presented under the pleadings the trial court found the following facts: That underneath the surface of the land of plaintiff, known as the Miller ranch, which is about four miles northerly from what is known as the lower gorge of the Coyote river, and underneath a stratum of impervious clay, there is a stratum of coarse, loose gravel seven feet thick, being from eighty-three feet to ninety feet below such surface, which is always full of water, under pressure, the same being constantly supplied to said stratum of gravel from the sinking and subsurface flow of the waters of the Coyote river, as hereinafter stated. Said stratum of gravel extends from plaintiff's land southerly, and approaches the surface

of the ground and connects with, and is a part of, the gravel bed of the Coyote river, just below and in said lower gorge of said river. The plaintiff for years past has had a well on said land extending down into said stratum of gravel, through which he has pumped the water therefrom upon his land, and irrigated his orchard, and, if unable to do so, his orchard and land will be irreparably injured. The Coyote river rises to the eastward of the Santa Clara valley, in that portion of the Coast Range mountains known as the Mt. Hamilton range. It is formed by the union of a number of smaller streams which rise and have their confluence south of Mt. Hamilton, and thence issues in the single stream of the Coyote river into the Santa Clara valley, through a narrow gorge, known as the upper gorge, about twenty miles south of the city of San Jose, and thence flows northerly along the eastern edge of the Santa Clara valley about eight miles to the point where the valley narrows to what is known as the lower gorge, which lies about twelve miles south of the city of San Jose. The channel of the river passes through this lower gorge, and extends thence northward about twenty miles to the San Francisco bay. The Coyote river has a watershed in that portion of the Mt. Hamilton range wherein it rises, of over 200 square miles, and supplies by far the greater portion of the underground or artesian waters of all that part of the Santa Clara valley which lies northerly of the lower gorge, and all the rain falling upon the watershed drains into the Coyote river before it enters the Santa Clara valley at the upper gorge. During a few days in times of freshets or high waters, much of the waters of said river runs in its bed from the upper gorge to the bay of San Francisco; but during some seasons freshets or high waters occur only to a limited extent, and in other seasons they do not occur at all; and at all times, whether they do or do not occur, a large portion of the waters of the river, and during the rainless months, substantially all thereof, sinks into said gravel stratum during its course to at least as far northerly as the city of San Jose, and flows or percolates through the said gravel stratum, and other gravel strata connected therewith, from and just below said lower gorge to at least as far northerly as the bay of San Francisco. Said waters keep said gravel stratum, and said other gravel strata connected therewith, full of water and under pressure, and the same rise up in plaintiff's said well from fifty-five to sixty-three feet above said stratum, the variation depending mainly upon the time of the year, and also upon the flow of water in the river, and said waters rise up in all the other wells which have been bored down to the said gravel strata connecting therewith. Between San Jose and the bay of San Francisco, such pressure causes the water in said gravel stratum, and the gravel strata connecting therewith, to actually overflow from the wells connected therewith in large quantities, making what is usually designated "flowing artesian wells." The largest of said flowing artesian wells are those nearest the bay of San Francisco, the waters in said

gravel stratum and gravel strata connecting therewith, which furnish water for said last-named wells, being at a lower level below the level of said gorge, and under greater pressure from said waters so sinking in said stratum at said gorge, than are the waters in said gravel stratum and strata at points further south from said bay of San Francisco. At the lower gorge Santa Clara valley is only about 400 yards wide, and consists almost entirely of the gravel bed of the Coyote river, and said gravel bed of said river there extends through the lower gorge between the hills at that point, and extends down to the bed rock, lying from 35 to 165 feet below the surface of the gravel through such gorge, and on the surface of the gravel bed of said river, or underneath through the gravel bed thereof, all the waters of said river and of said watershed flow and percolate in a northerly direction, and all of said waters flowed or percolated through said gravel bed, underneath the surface thereof, at the date of commencing this action.

It is further found that at the time this action was commenced—January 9, 1904—defendant had sunk a shaft in the gravel bed of the Coyote river at the lower gorge, and was then installing powerful machinery and pumps, and intended therewith and by other means to divert substantially all of the surface and subsurface water of the river, amounting to some 20,000,000 gallons per day or more, prevent these waters from passing over said lower gorge northward, and carry them by pipes and other means from said point of diversion to other points, and sell the same as an article of merchandise, thus preventing them from returning to the river and supplying water to the gravel stratum in the land of plaintiff, which stratum, if they were so diverted by defendants would be without sufficient water to enable plaintiff to irrigate his orchard or land; that defendant corporation also intended to divert during a portion of each year a large portion of the surface waters of the Coyote river at points on the river before and after it emerged from the Mt. Hamilton range at the upper gorge, and above said lower gorge, and divert the same to other points for sale, and prevent any portion of the water from returning to the river or gravel bed thereof, and, generally, that the defendant corporation, unless restrained, threatened to divert and carry the waters of the river beyond their own lands for sale as merchandise, prevent them from returning to the river or gravel bed, with the result that any or all of these threatened and intended diversions would prevent these waters from flowing or percolating into the gravel stratum northerly of the lower gorge, and prevent plaintiff from having any water in his well with which to irrigate his orchard, and so cause irreparable damage to the same. Continuing, it is found that no material part of the waters underneath the land of plaintiff are supplied from any source other than the waters which fall upon the watershed of the Coyote river.

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The decree entered perpetually enjoined the defendant corporation and its officers from arresting or obstructing at or above the lower gorge (except for the reasonable use thereof on the lands of the said corporation in the exercise of its riparian rights) any of the water of the Coyote river which, excepting for said arresting or diverting, would flow on the surface of the bed of said river through said gorge, or would flow or percolate through said gorge underneath the surface thereof.

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There can be no doubt but that it was as clearly proved under the evidence as such matters can be proved that there are underlying a vast territory in the Santa Clara valley—some twenty miles square—numerous channels created by the Coyote river through its action in ages past when, in the building up and forming of the valley, its waters rushed in enormous quantities from the mountains, changing from one side of the valley to the other, and constantly varying its course in its flow through the lower gorge northward towards the bay of San Francisco. These old channels now lie beneath the surface of the valley at varying depths; channels beside channels, and channels crossing and inter-connecting with each other, through each of which the Coyote river once flowed in its open course, but which are now underground channels filled with loose and coarse gravel, through which waters still flow, supplied to them through percolations from the Coyote river, with which these old gravel channels have always been connected, and that the particular underground channel or gravel stratum from which the well of plaintiff is supplied constitutes one of these old channels, which is likewise connected with and supplied from the waters of Coyote river. The intake of all these old channels, including that from which the plaintiff derives his water, is in the enormous bed of gravel extending several miles northerly below the lower gorge.

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While it is insisted that the finding that Miller's well was in a stratum of gravel under pressure is not supported by the evidence, yet no good purpose can be subserved by discussing this point. The evidence shows that as a fact the well was sunk in a stratum under pressure, as the court found, but whether it was or not can make no difference in Miller's legal rights. The right of a person owning land upon a channel of underground water is not measured by whether the water is under pressure or not, but by considering whether the waters come to him in a natural defined flow so as to constitute a part or parcel of his lands, a matter which will be considered as we discuss the law applicable to this matter.

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Having disposed of (as far as we deem consideration necessary) the attack on the findings and the claim of alleged want of findings, and being satisfied that there is no merit in the points made relative

thereto, we come now to a consideration of the legal principles involved on the appeal.

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As an abstract proposition of law, applied to the concrete facts in this case, the contention of appellants is that, nothwithstanding it is clearly established that the waters, surface and subsurface, which either flow or percolate through the channel of the Coyote river, at or above the lower gorge, pass through well-defined artesian gravel strata in the Santa Clara valley connected with the stream itself, and furnish a supply of water for irrigation to a territory to which its use is essential, still that territory can be deprived of this inestimable benefit by an appropriator seeking to divert all the waters of the river away from the stream as a commercial proposition, thus rendering the lands overlying the various artesian strata valueless, and that owners of these superimposed lands have no rights which are invaded, and hence no right to apply for an injunction to restrain such a diversion.

The principal stress of the argument of appellants against the right of plaintiff to restrain their diversion of the waters flowing through the lower gorge and percolating into the subterranean stratum under the land of plaintiff is based on the claim that plaintiff is not an owner of land riparian to the stream, who would be entitled to a flow of its waters, but is simply an owner of land situated above percolating waters supplied in part by percolation from the stream, who has no rights against an appropriator. This is, in effect, a contention that the rule at common law applicable to percolating waters, which gave an owner of land all that lay beneath it, with a right to interrupt and take away waters passing to his neighbors' wells—the doctrine of *cujus est solum*—governs the respective rights of plaintiff and defendants. But whatever the extent to which that doctrine may have heretofore obtained in this state, at least ever since the decision in Katz *v.* Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. 35, it has been modified by the application of the more reasonable doctrine of *sic utere tuo* as to percolating waters.

It would be a waste of time to particularly discuss the reasons which impelled the modification of the common-law doctrine of an absolute right in each landholder (and as an appropriator the appellants insist upon this right) to abstract all percolating waters under his land and dispose of them as he saw fit, without regard to what extent he might deplete these waters under the lands of his neighbors. The climatic conditions of this state, the great stretches of arid and semiarid lands, the uncertainty of the seasons and varying rainfall, the necessity of irrigation, and the vast superiority of underground waters as a steady and ready means of irrigation over the uncertainty of a similar supply from a surface stream which, in many instances, becomes dry at the very time when irrigation is necessary; the vast areas of land brought under cultivation and production by irrigation, and additional areas still to be improved by it;

the enormous draft which this constant improvement and cultivation makes on a supply which is limited, and which will become inadequate for all as population increases and additional lands are to be brought under cultivation and improved by irrigation—these, and many other causes, impelled a departure from the old doctrine and a limitation of it, and the adoption of the just principle that a common and essential necessity—water—when supplied to well-defined strata from whatever source, should be preserved to lands overlying them for reasonable use upon them.

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The doctrine thus announced in this pioneer case has been subsequently followed, so that the rule is now settled beyond further question. See McClintock *v.* Hudson, 141 Cal. 281; Cohen *v.* La Canada, 142 Cal. 437; Montecito, etc., Co. *v.* Santa Barbara, 144 Cal. 584; Verdugo Canyon Water Co. *v.* Verdugo, 152 Cal. 655; Burr *v.* Maclay, 154 Cal. 439; Hudson *v.* Dailey, 156 Cal. 617.

But, it is insisted by appellants that this rule only applies as to correlative rights of different persons owning lands overlying the same plane of percolating waters, and does not apply so as to entitle a nonriparian owner, although the stratum underlying his land is directly supplied by waters percolating from the stream to prevent the diversion of the waters of the stream by an appropriator. The precise question as to the respective rights of an appropriator of water to be used beyond the watershed, and of one claiming an uninterrupted flow of these waters to supply, by percolation, a water-bearing stratum underneath his land and connected with the stream, has not been heretofore presented. But there are general principles of law which have been applied as between other appropriators of the stream waters and claimants to the flow or to the percolating waters of the stream which are equally applicable as between the parties to this action. It is true in this case that the plaintiff is not a riparian owner, but neither does it appear, as far as their rights are here asserted, that appellants are. They are only asserting rights as appropriators under a claim that they have appropriated all the surplus waters of the Coyote river, and are entitled to certain impounded waters between the gorges. Be that as it may, however, as far as any waters of the river are concerned (there being no impounded waters), we do not perceive that the fact that the plaintiff is not a riparian owner can affect his rights as against the appellants. As between riparian owners, it is conceded, as the law declares, that one riparian owner is not entitled to divert the waters of a stream for use at some distant point for commercial purposes so as to prevent another riparian owner to whom they would otherwise be available from using them on his lands, and it is established by the authorities to which we have heretofore referred that, as between owners of land overlying a common substratum of percolating water, this can not be done. This being so, we perceive no reason why the same rule

should not be applied as between owners of land overlying a substratum of water directly connected with either the surface or subsurface flow of the stream, and deriving practically its exclusive supply from that source. The theory upon which the right of a riparian owner to be protected in the use of the waters of a stream to which his lands are riparian is that, nature having given these lands the benefit of the flow, and the natural advantage of its use on the lands, one riparian owner may not divert these waters to lands not riparian, to the injury of another riparian owner who can use them. The same principle has been applied, as we have seen, to the use of waters as between the owners of lands, overlying a common stratum of percolating waters. And we perceive no reason why the same principle should not be applied as between an appropriator of the waters of a stream to be taken beyond the watershed for commercial purposes and the owners of lands overlying an artesian stratum which is conclusively shown to be so connected with the stream as to derive its supply of water by percolation therefrom to this stratum. * * * In either case there is a natural supply of water of which the lands by reason of their location, either as riparian or above a common subterranean stratum, or as lying over a water-bearing stratum supplied by percolation from the stream, have a natural advantage to the use of the waters. Lands are invariably purchased in view of the benefits which they may derive from being riparian to a stream or overlying well-supplied strata of water, the right to the flow or extraction of which is a part and parcel of the land, and there is no rational basis for any distinction between the classes as to the right to prevent a diversion of waters for use elsewhere, whether it be attempted by a riparian owner against another riparian owner, or by one owner of land over a common stratum of underlying water against another owner, or by an appropriator of the waters of a stream as against the owner of land overlying the water-bearing stratum directly supplied by percolation from the stream. As far as the owner of lands overlying a gravel stratum is concerned, it makes no difference in his rights, as against an appropriator of the water, from what source the supply comes which directly supplies his water-bearing stratum—whether from a stream or a saturated plane or other body of water which by natural flow or percolation, either surface or subterranean, clearly supplies his underground stratum. It would present an anomalous condition of the law were it the rule that, while a riparian owner may prevent an appropriator from diverting to his injury the waters of the stream for use beyond the watershed, and one owner of land overlying a common stratum of percolating water may restrain another owner similarly situated from making a like diversion, the owner of lands whose underlying stratum of water is directly and clearly supplied by per-

colation from the waters of the stream, and who will be greatly injured by a diversion, is not entitled to prevent it. There is no reason or any difference in the rule between the classes and none should exist. Such land owner has a right to restrain a diversion from the stream or saturated plane, or other well-defined supply, by an appropriator or any one else who seeks to divert such stream or other supplying waters from their natural percolating flow, for use elsewhere than upon lands to which, as waters of the stream, they are riparian, or which, as waters of an underground stratum, may reasonably and usefully be applied to the overlying land. Under this rule, as far as the artesian stratum of plaintiff, which is a well-defined one, and has its intake in the vast bed of gravel in the lower gorge, is supplied by the surface waters of the Coyote river passing over said gorge and percolating to the stratum, or is supplied by the subsurface waters in the Coyote valley between the upper and lower gorge (assuming for present purposes that these may not be considered as a part of the river), which pass over the lower gorge and percolate through the gravels below and into the artesian stratum of plaintiff, or as far as the stratum is supplied by percolation from both of these sources, the right of plaintiff to have the flow of these waters in his stratum uninterrupted is paramount to the right of defendants to divert them for use elsewhere, as the court found they intended to do, to the irreparable injury of plaintiff, and plaintiff was entitled to a decree enjoining such diversion.

But it is insisted by appellants that if the plaintiff has a right to enjoin the diversion of the waters of the stream which would otherwise percolate to and supply the artesian stratum underlying his land, the court was not warranted in enjoining the appellants from diverting the flood waters of the Coyote river, which it was claimed were wasted and lost in the bay of San Francisco. There can be no question but that an appropriator of water may divert for use, to any point beyond the watershed, any portion of the waters of a stream which can serve no useful purpose either to the riparian owners, or, in the instant case, any waters of the Coyote river which might serve no such purposes in supplying the underground stratum of plaintiff, or which are in excess of the quantity necessary for that purpose. Fifield *v.* Spring Valley Waterworks, 130 Cal. 552.

But it is quite obvious that merely because waters are flood or storm waters of a stream—that is, on account of unusual rains the waters of a stream are increased beyond the normal flow—these flood or storm waters are not therefore surplus waters of the stream which serve no useful purpose, and are subject to appropriation. What are called the storm waters of the Coyote river are not waters which are precipitated over the lower gorge only in occasional seasons. They are generally of annual occurrence, and flow at great height and breadth over the deep, porous gravel beds

below the lower gorge, although they last but a short time. * * * All these waters are necessary, of themselves or by their force, to supply the underground waters, which they, even now, fail to do to the full capacity of the underlying strata, to which full capacity the plaintiff and others interested in them are entitled. Performing this necessary and indispensable service which could not be supplied without them, no part of them can be said to be waste waters until they have performed it, as far as they are capable of doing so, and have passed over the gravels on their way to the bay.

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We are satisfied that the findings as made are sustained by the evidence, and the decree supported by the findings, and the judgment and order appealed from are therefore affirmed.[69]

CITY OF LOS ANGELES *v.* HUNTER ET AL.

CITY OF LOS ANGELES *v.* BUFFINGTON ET AL.

1909. SUPREME COURT OF CALIFORNIA

156 *Cal.* 603, 105 *Pac.* 755

HENSHAW, J.: The suit of the city of Los Angeles *v.* Hunter et al. is an action against forty-seven owners of land in the San Fernando valley, to quiet title in the plaintiff to its asserted paramount right to use of the waters of the Los Angeles river. The case of the city of Los Angeles *v.* Buffington et al. is an action against 160 owners or tenants of land in the same valley, brought for the same purpose, and also to obtain an injunction restraining the defendants from making any diversion of water from the river when it is required by the city for supplying its municipal and domestic needs. The actions were tried together, and, from the judgments which followed in favor of the city, the defendants appeal. The legal propositions presented upon all appeals are substantially identical.

Saving certain minor objections going to the introduction or rejection of evidence, the principal contentions of appellants are: First, that the waters which they were taking by means of wells were not waters of the Los Angeles river; and, second, if they were waters of the Los Angeles river, the city of Los Angeles had no superior right to the use of them. The lands of these defendants, embracing in all about 5,000 acres, are situated in the southeastern portion of the San Fernando valley, where the surrounding mountains draw together and form what is called the "Nar-

[69] See Kans. Gen. Stat. 1909, §§ 4427-4429.

rows." A description of the San Fernando valley, adequate for all the purposes of this consideration, will be found in City of Los Angeles *v.* Pomeroy et al., 124 Cal. 597. The cases of Katz *v.* Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. 35, and McClintock *v.* Hudson, 141 Cal. 275, together with the Pomeroy case, above cited, give so full and satisfactory an account of the water conditions existing, not alone generally in the arid portions of this state, but particularly of the conditions existing and controlling the considerations of the questions here presented, that a reference to them renders unnecessary any detailed description.

The defendants were using water pumped from wells of various depth, which wells were situated at an average distance of about 1,000 feet from the surface border of the Los Angeles river, though in instances the distances of certain wells were two or three miles. The contention of the city is that these wells abstracted water belonging to the Los Angeles river, to the use of all of which water it has a paramount right. The court so found. The defendants' contention is two-fold: First, that the waters are strictly percolating waters, not belonging to the subterranean flow of the stream, but if concededly on the way to join and swell such flow, still percolating waters, to the use of which, as owners of the land, they have an absolute indefeasible right; second, that over all the San Fernando valley extends a clay blanket, impervious to water, underlying which blanket are water-bearing gravels, that the waters above this blanket feed the Los Angeles river, while the waters below this blanket do not; that they draw their well waters from the gravels below the blanket, and therefore, conceding that the city of Los Angeles has a paramount right to the use of the waters of the river, they are not trespassing upon this right. The court rejected both of these contentions in the following findings: "That the waters of said river, in its course through said valley, penetrate into and completely fill the voids of said permeable material, down to bed rock, under the surface channel of said river, and on both sides of said channel, throughout the whole width of said valley, from a point at or above the level of the surface stream of said river down to bed rock. It is not true, as alleged in the answers herein, that none of the underground waters in any of the lands of the defendants, described in the amended complaint herein, are part of the Los Angeles river, mentioned in the said amended complaint, or of the waters thereof, but are waters percolating in said lands, and form a part of the soil thereof, so as not to constitute a stream or watercourse; but, on the contrary, the court finds that all of the underground waters in all of said lands, from the surface of the ground down to bed rock, are flowing waters, and are part of the subterranean stream of said Los Angeles river." By these findings the court adopts the theory which is supported by the evidence of certain of the experts, that the waters of the Los Angeles river

proper entering the valley sink to bed rock and spread out laterally, filling all the voids of the soil, and so moved slowly down to the Narrows, where the Los Angeles river, owing to the declension in that direction of the land surface, appears as a visible stream. It is earnestly contended against this finding: That it takes no account of proved conditions; that it treats this great valley as being all a part of the Los Angeles river; that in so doing it stultifies physical and geological facts; that it eliminates from consideration the rainfall upon the surface of the valley; the water from all the surrounding mountains which not following well-defined channels, still by gravity is carried down and sinks into the valley lands; and the fact that the water flowing into the valley by numerous channels itself sinks into the lands of the valley miles distant from the thread of the river, yet this water also is treated as part of the stream long before, in the course of nature, it can have reached the true subterranean flow thereof. So it is insisted by appellants that these waters are strictly percolating waters, and that of them they have the common-law right of absolute ownership, as modified in this state only by the doctrine of Katz *v.* Walkinshaw, supra, namely, that the quantum of water which they use shall be in reasonable proportion to the whole thereof, and that the water so taken shall be used upon the surface soil of the basin, or, at least, not carried away for exterior use, to the injury of any owners of the land within the basin.

But in the view which we take, it is immaterial whether the San Fernando valley be considered a great basin, saturated by water from the inflow of the Los Angeles river and its tributaries, or saturated as a result of all the causes which appellants assign. In passing, it will suffice to say that the court was justified, upon a conflict in the evidence, in rejecting the theory of the clay blanket covering the valley at a varying depth. Unquestionably the San Fernando valley is the great natural reservoir and supply of the Los Angeles river. Unquestionably the cutting off of this supply would as completely destroy the Los Angeles river as would the cutting off of the Great Lakes destroy the St. Lawrence. San Fernando valley may indeed be regarded as a great lake filled with loose detritus, into which the drainage from the neighboring mountains flows, and the outlet of which is the Los Angeles river. Impeded by the soils, these waters, of course, move more slowly than they would in an open lake; but unquestionably the general movement of practically all is southeasterly to the Narrows, through and out of which flows the Los Angeles river proper. Unquestionably, also, a serious interruption of or interference with this supply would as certainly impair the volume of water carried by the Los Angeles river as though the interruption and interference were with a surface flowing tributary thereof. The waters of the San Fernando valley therefore are

not "percolating waters" in the common-law sense of the term—vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. These waters percolate, it is true, but only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet, in the effort, in conformity with physical law, to attain a uniform level. If it be here conceded that the city of Los Angeles has the paramount right to the use of the waters of the Los Angeles river, then the abstraction of waters from this valley is as clearly an interference with that right as it would be if the valley, instead of being filled with debris, were an open lake from which the river drew its whole supply. The doctrine of percolating waters as applied by the common law has of necessity been modified to meet the conditions existing in this state, conditions which never confronted the authors of that body of laws, and of the existence of which it is safe to say they never conceived the possibility. Not only has that doctrine been modified in Katz *v.* Walkinshaw, supra, but it has further received necessary and just modification in McClintock *v.* Hudson, supra, where, quoting from the syllabus, which correctly epitomizes the view of this court, it is said: "Under the rule established in Katz *v.* Walkinshaw with respect to percolating waters, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating waters therein, and apply it to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream to the damage of others having rights therein." If, as here contended and found, the city of Los Angeles has paramount right to the use of all the waters of the river, then, under the doctrine thus enunciated, none of these so-called percolating waters may be withdrawn to the invasion and injury of such right. See Hudson *v.* Dailey, 156 Cal. 617.

To this proposition we now come. The decisions of this court in Lux *v.* Haggin, 69 Cal. 255; Vernon Irrigation Co. *v.* City of Los Angeles, 106 Cal. 237; City of Los Angeles *v.* Pomeroy, 124 Cal. 597; City of Los Angeles *v.* Los Angeles Farming and Milling Co., 152 Cal. 645; taken with the cases of Hooker *v.* City of Los Angeles, 188 U. S. 314, 23 Sup. Ct. 395, 47 L. ed. 487, 63 L. R. A. 471, and Devine *v.* City of Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. ed. 1046—must be regarded as a definitive determination of the city's right. Collectively, these cases present the same arguments as are here advanced by appellants, and the decisions denying validity to these arguments must be considered as closing the contention. The right to use the water upon annexed territory not within the limits of the original pueblo is distinctly declared in City of Los Angeles *v.* Pomeroy, supra. Moreover, with the extraordinary growth of the city of Los Angeles within the original pueblo limits of four square leagues, this question becomes of no practical importance, since

it is fairly well established that all of the supply of the Los Angeles river is required for legitimate uses within the limits of the old pueblo. We have thus considered the principal contentions advanced by appellants. Certain minor propositions may be disposed of with brief review.

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No other matters call for special attention, and for the foregoing reasons the judgments and orders appealed from are affirmed.

We concur: Shaw, J.; Angellotti, J.; Melvin, J.; Sloss, J.; Lorigan, J.

WILLOW CREEK IRRIGATION CO. ET AL. *v.* MICHAELSON

1900. SUPREME COURT OF UTAH

21 Utah 248, 60 *Pac.* 943, 51 *L. R. A.* 280, 81 *Am. St.* 687

BARTCH, C. J.: This action was brought to restrain the defendant from interfering with the water of a certain spring, and to quiet title to the use of the water in the plaintiffs. It appears from the findings of fact, which are not disputed, that the plaintiff company is a corporation duly organized and existing under the laws of Utah, and its business is to control and distribute to its stockholders, for the purposes of irrigation, the water of Willow creek and its tributaries, in the county of Sanpete, state of Utah. The stockholders are owners of land which is being irrigated from that stream, and the plaintiffs are the owners by appropriation of all the waters flowing therein. In the year 1891 the United States government conveyed by patent to the defendant a certain tract of land, and thereafter water appeared on the land from natural causes, and formed a bog or marsh. The water stood still in a natural depression covering about three-fourths of an acre of land, and increased in volume, until 1895, when it flowed in a stream, through a natural depression, into Willow creek, and thereafter continued to flow from the bog or marsh into that creek, and the plaintiffs used it with the other water of the stream. In October, 1898, and January, 1899, the defendant, by means of a dam, diverted the water flowing from the bog or marsh, and thereby prevented its flowing into Willow creek, and its use by the plaintiffs. The defendant thus diverted the water, claiming ownership thereof and right to its use upon her land. At the trial the court rendered judgment in favor of the defendant.

The decisive question to be determined upon this appeal is whether the defendant, by virtue of her patent to the land on which

the bog or marsh was formed, is the owner of the water in dispute. The appellants contend that notwithstanding the fact that, at the time the government conveyed the land to the respondent, there was no bog or marsh thereon, nor any water issuing or flowing therefrom, the stream, which afterwards began to flow, and thenceforward continued to flow, therefrom, was a natural stream, and subject to appropriation, under section 2780, Comp. Laws Utah 1888, and that they had a right to and did appropriate the water thereof. The respondent insists that since, at the time the title to the land vested in her, the water in question had not come to the surface and its existence was unknown, the right to such water passed to her with the title to the land, as a part of the purchase, and was not included within the terms of the statute, and not subject to appropriation. In the section of the statute referred to, it is provided: "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances: (1) Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water-course, lake, or spring, or other natural source of supply." Undoubtedly, under this provision, any person or persons may divert and use the unappropriated water of any "natural stream, water-course, lake, or spring, or other natural source of supply," for any of the purposes mentioned in the statute, but it is evident that the enactment, although comprehensive terms are employed therein in reference to the appropriation and use of water for the purposes of irrigation, must be construed to mean a "natural stream, or other natural source of supply," flowing or situated upon lands over which the sovereignty has dominion, or which forms a part of the public domain, and not to streams or springs or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto passed into private ownership. The statute, therefore, can not be so interpreted as to include a stream flowing from a bog or marsh like the one in the case at bar, which did not make its appearance upon the surface until after the land had been purchased from the government by a private individual.

When the United States issued its patent to the respondent, neither the bog nor marsh, nor the water in question, was visible upon the land conveyed. Nor was there any known and defined subterranean stream thereon. At that time the water, if it existed at all, was percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses, or banks. Water so percolating and flowing forms a part of the realty, and belongs to the owner of the soil. A conveyance or grant by the United States of any part of the public domain to a person, natural

or artificial, carries with it the right of filtrating or percolating water, and to streams flowing through the soil beneath the surface, but in undefined and unknown channels, just the same as it carries with it the right to rocks and minerals in the ground which have not been reserved in the instrument of conveyance or by statute. Water, intermingling with the ground or flowing through it by filtration or percolation or by chemical attraction, is but a component part of the earth, and has no characteristic of ownership distinct from the land itself. In the eye of the law, water so commingled and flowing, or motionless, underneath the surface, is not the subject of ownership apart and distinct from the soil. If, however, subsurface streams of water flow in clearly defined channels, it is otherwise, for then the rules of law applicable to surface streams and water apply. In Gould, Waters, sec. 280, the author says: "Water percolating through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable, belongs to the realty in which it is found. The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor, or consequentially injure his clearly defined rights, is applicable to the interruption of subsurface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress. The landowner may therefore make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land." So, in Kin., Irr., sec. 49, it is said: "Percolating waters are those which pass through the ground beneath the surface without definite channels, although the same rules of law govern those which have definite channels, but the course of which is unknown and unascertainable. Where there is nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolation of water through the soil. Percolating waters, and those whose sources are unknown, belong to the realty in which they are found." In Bloodgood *v.* Ayres, 108 N. Y. 400, Mr. Justice Finch, delivering the opinion of the court said: "Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to water courses and their diversion apply. Broadbent *v.* Ramsbotham, 34 Eng. Law & Eq. 553; Rawstron *v.* Taylor, 33 Eng. Law & Eq. 435; Village of Delhi *v.* Youmans, 45 N. Y. 362; Goodale *v.* Tuttle, 29 N. Y. 466; Ellis *v.* Duncan, 21 Barb. 234; Barkley *v.* Wilcox, 86 N. Y. 147. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few exceptions are admitted to exist, and others may occur; but, outside of

these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water courses, and they may be intercepted or diverted by the owner of the land for any purpose of his own." In Metcalf *v.* Nelson, 8 S. Dak. 87, it was said: "As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control." So, in Frazier *v.* Brown, 12 Ohio St. 294, it was observed: "The law can not properly limit the ordinarily absolute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon, or rights in, a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject-matter of his complaint." And in Crescent Min. Co. *v.* Silver King Min. Co., 17 Utah 444, this court said: "The waters issuing from the artificial tunnel into the lake are found to be underground percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks, and course. Under such a state of facts, the law seems to be well settled that water percolating through the soil is not, and can not be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks." Kin., Irr., sec. 48; Washb., Easem., p. 505, par. 2; Hanson *v.* McCue, 42 Cal. 303; Roath *v.* Driscoll, 20 Conn. 532; Haldeman *v.* Bruckhart, 45 Pa. St. 514; Acton *v.* Blundell, 12 Mees. & W. 324; Taylor *v.* Welch, 6 Ore. 199; Railroad Co. *v.* Dufour, 95 Cal. 615, 19 L. R. A. 92; Ocean Grove *v.* Asbury Park, 40 N. J. Eq. 447; Village of Delhi *v.* Youmans, 45 N. Y. 362; Williams *v.* Ladew, 161 Pa. St. 283; Mosier *v.* Caldwell, 7 Nev. 363; Chase *v.* Silverstone, 62 Maine 175; Chatfield *v.* Wilson, 28 Vt. 49; Trustees *v.* Youmans, 50 Barb. 316.

It appearing, in the case at bar, that at the time of the conveyance of the land by the government the water in question was not visible thereon, nor its existence known, and there being nothing to show that it flowed thereon at any previous time, or that there was at the time of the purchase any well defined and known subterranean stream there, the presumption is that the water was percolating through the earth, and that the stream in question is the result of filtration or percolation; and, the water having commenced to flow after the patent was issued, it belongs, under the authorities, as we have seen, to the respondent or owner of the

land as a part thereof. The water was therefore not subject to appropriation under any statute or rule of law, and by its use the appellant acquired no title to it. Hence the respondent had the lawful right to divert and use the water in such manner as she chose, and may continue to do so. The court committed no error in deciding this case in her favor. The judgment is affirmed with costs.[70]

McCarty, District Judge, concurs; Baskin, J., concurs in result.

SULLIVAN ET AL. *v.* NORTHERN SPY MINING CO.

1895. SUPREME COURT OF UTAH

11 *Utah* 438, 40 *Pac.* 709, 30 *L. R. A.* 186

SMITH, J.: The main question in this case, and the only one, in fact, which we deem it necessary to consider, is, can the discoverer of a flow of percolating waters on the public lands, by digging wells and improving the same and constantly using the water for a beneficial purpose, acquire a right to take water from such wells as against an owner of the land on which the well is located, where the owner of the land acquired title by a location made subsequent to the digging of the wells? Many other questions are raised on this appeal, but their materiality all depends on the answer to the question just stated. If this question is answered in the affirmative, the judgment must be affirmed; if answered in the negative, it must be reversed; so we do not deem it necessary to examine the other questions presented.

We are not aware of any case having been decided in these arid regions, in which this precise question has been passed upon. The doctrine may be said to be settled that the owner of lands has a right to dig thereon, and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or spring of an adjacent proprietor. See Hanson *v.* McCue, 42 Cal. 303; Kinney, Irr. secs. 49, 298; Railroad Co. *v.* Dufour, 95 Cal. 615. But this rule does not determine the case at bar. The facts here, so far as necessary to be stated, are: The plaintiffs are the owners of a mining claim in Tintic mining district, located in 1889. When this claim was located there was a well dug in the ground, and one Barney had a house at or near this well, and was engaged in

[70] See Vernon Irrigation Co. *v.* Los Angeles, 106 Cal. 237, 39 Pac. 762; Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Hooker *v.* Los Angeles, 188 U. S. 314, 23 Sup. Ct. 395, 47 L. ed. 487, 63 L. R. A. 471; Los Angeles *v.* Los Angeles Farming, &c., Co., 152 Cal. 645, 217 U. S. 217, 30 Sup. Ct. 452, 54 L. ed. 736, 93 Pac. 869, 1135.

hauling water from the well to the defendant. The defendant continued to procure water from the well, and plaintiffs bring this suit to recover damages, alleging trespass. The undisputed facts are that the predecessors in interest of Barney and the defendant, in about 1870, discovered evidences of percolating waters at the point where the well was dug, and by digging a hole about three feet deep procured a supply of water. These discoverers were miners, and were working a mine, part of which, at least, the defendant now owns. It seems that this hole or well, if it may be called such, was so shallow that cattle and horses on the range came to it and trod down its banks, so that the discoverers arranged with one Barney that if he would repair the well, wall it up, and protect it, he might use water therefrom. Barney did this, and put in a pump. For about twenty years it remained in this condition. The well, being in the midst of a desert, was used as a source of water supply for several mines in the neighborhood, and was all the time on public lands of the United States. In 1889 the plaintiffs located the ground, including the well and Barney's house, as a mining claim. In 1890 Barney conveyed whatever right he had in the premises to the defendant, and it continued to procure water from the well. The well is shown to be from ten to fifteen feet deep, and to furnish a very abundant supply of water. The question is, has the defendant an easement in plaintiff's land to continue to take water from the well constructed by its predecessors? The federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there, and in 1866 congress passed an act (14 Stat. 253; Rev. Stat. sec. 2339), which provided, among other things, as follows: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." By the act of July 9, 1870 (16 Stat. 218; Rev. Stat. sec. 2340) it was further provided: "All patents granted, or pre-emption, or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." The question is, then, is the right of defendant to use water, under the facts stated, one that is recognized by the local customs and laws? Section 2780, Comp. Laws Utah, provides: "A right

to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing or sluicing ores and other like purposes is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of and reasonable necessity for such use thereof under any of the following circumstances: First, whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake or spring or other natural source of supply." We think it would be a very strained construction to hold that a hole dug three feet deep, into which the waters naturally gathered, was not a natural source of supply, while it is conceded if the water come to the surface and flowed along a few feet, and was then collected in a like hole, it would be a natural source of supply. We are inclined to give these statutes a much broader construction. In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment. This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator. The determination of this question disposes of the whole case, and it is therefore ordered that the judgment be, and it is, affirmed.[71]

Merritt, C. J., and King, J., concur.

DICKEY ET UX. *v.* MADDUX ET UX.

1908. SUPREME COURT OF THE STATE OF WASHINGTON

48 *Wash.* 411, 93 *Pac.* 1090

ROOT, J.: This is an action brought by respondents to enjoin appellants from interfering with the taking of water from certain alleged springs situated on the lands of appellants, which water the respondents claim was appropriated by their predecessor in interest in 1883. From a decree in favor of plaintiffs, this appeal is taken by defendants.

[71] See Bliss *v.* Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Johnstown Cheese Mfg. Co. *v.* Veghte, 69 N. Y. 16, 25 Am. Rep. 125; Minard *v.* Currier, 67 Vt. 489, 32 Atl. 472; Paine *v.* Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; Wheelock *v.* Jacobs, 70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. 659; Hamby *v.* City of Dawson Springs, 126 Ky. 451, 104 S. W. 259; Bower *v.* Moorman (Idaho), 147 Pac. 496; Wright *v.* Austin, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. 97.

It is urged by appellants that the so-called springs are not flowing springs, nor in reality springs at all, and that there is no stream connected therewith; but that they are merely pools of seepage water coming from the side hill, and making a marsh or bog, and not constituting the character of water authorized to be appropriated under the law. It appears that there was about half an acre of these so-called springs, and that during a portion of the year there was a surrounding area of something like ten acres which was marshy. One witness said: "There was a piece of level ground that goes off to the south and drops very abruptly. These springs rest right in the brow of that little drop-off. There was quite a bit of water standing around in the springs; looked like there might be five or six springs." The evidence showed that there was no stream leading into these springs, and that the water therefrom formed no channel or stream in leaving, although during a portion of the wet season of the year some of the water would flow down (but not in any stream or channel) for a short distance on the side hill, where it would disappear in the soil. A territorial statute enacted in 1873 read as follows: "Be it enacted by the legislative assembly of the territory of Washington, that any person or persons, corporation or company who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima county, Washington territory, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said county for the purpose of irrigation and making said land valuable for agricultural purposes to the full extent of the soil thereof." Laws 1873, p. 520. This and the common law were in force at the time of the alleged appropriation of this water.

Respondents claim that these springs were surface bodies of water, and that, though their source may be from percolating water, they themselves are situated open to the air, and that they are flowing springs a portion of the year. It is admitted that this land was originally a portion of the Northern Pacific Railway Company's land grant. It is claimed by respondents that the rights of this company did not attach to said lands until December, 1884, and that, under sec. 2339 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 1437, respondents or their predecessors in interest had a right to appropriate this water from these springs prior to said date. An examination of the evidence convinces us that these pools of water were not live springs, and constituted nothing more than a bog occasioned by the seepage water. No stream or channel entered this bog, or flowed therefrom. The respondents and their predecessors gathered this water by digging a large number of holes and small ditches, and it was only by this artificial means that any channel was made or any flow of the water obtained, other than the natural percolating and seepage thereof, and there was but a comparatively small amount of that. We think there was no authority in law for the appropriation of water of this

kind prior to the enactment of the state statute of 1891, even if that statute would authorize it—a question not necessary to be now decided.

It is urged by respondents that they have used the water a sufficient length of time since the enactment of the statute of 1891 to give them a prescriptive right thereunder. As they have never complied, nor attempted to comply, with the provisions of the last-mentioned statute, we do not believe they are entitled to invoke it in support of their claim to the use of this water. See Wheelock *v.* Jacobs, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. 659; Slaught *v.* U. P. R. Co., 39 Wash. 576; Atkinson *v.* Wash. I. Co., 44 Wash. 75; Hathaway *v.* Yakima W. L. Co., 14 Wash. 469, 56 Am. St. 874. Farnham on Waters and Water-courses, p. 1561, sec. 458, says: "Water oozing from a spring through a soft and spongy ground, and flowing into a pond, does not constitute a stream within the meaning of a lease demising the pond of water and the water of the stream leading thereto; and the lessor is not liable for having sunk a tank on the ground adjoining the demised premises, thereby drawing off from the marshy ground such oozing water." See, also, Geddis *v.* Parish, 1 Wash. 587; Meyer *v.* Tacoma L. & P. Co., 8 Wash. 144; Southern Pac. R. R. Co. *v.* Dufour, 95 Cal. 615, 19 L. R. A. 92; Angell on Water-courses (7th ed.), secs. 108b and 108p; Farnham, Waters and Water Rights, p. 2082, sec. 672a.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to dismiss the action.[72]

Hadley, C. J., and Mount and Crow JJ., concur. Rudkin and Fullerton, JJ., dissent.

[72] REMINGTON AND BALLINGER CODE OF WASHINGTON

§ 6316. The right to the use of water in any lake, pond, or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state, for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water, or for waterworks, may be acquired by appropriation, and as between appropriations, the first in time is the first in right. [L. '91, p. 327, § 1; 1 H. C., § 1709.]

§ 6339. All ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, seepage, or spring waters of the state, shall be covered by the same laws as those ditches constructed for the purpose of utilizing the water of natural streams and lakes: Provided, that the person upon whose lands the seepage or spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands. [L. '90, p. 710, § 15; 1 H. C., § 1732.]

§ 6340. All persons who shall have enjoyed the use of the water in any natural stream or lake for the irrigation of any land by the natural overflow or seepage of the water of such stream or lake shall, in case of diminution of the water supplied by such stream or lake, from any cause, so as to prevent such irrigation therefrom in as ample a manner as formerly, have the right to construct a ditch for the irrigation of such land, and to take water from such stream or lake therefor; and his right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he occupied and used such land. [L. '90, p. 710, § 16; 1 H. C., § 1733.]

BROSNAN *v.* HARRIS

1901. SUPREME COURT OF OREGON

39 *Ore.* 148, 65 *Pac.* 867, 54 *L. R. A.* 628, 87 *Am. St.* 649

BEAN, C. J.: This is a suit to restrain the diversion of and interference with the water of a certain spring in Malheur county, known as "Fox Spring." Prior to August 4, 1899, the land upon which it is situated was unoccupied public land of the United States. In November, 1898, the plaintiff cut a ditch or trench some thirty feet long through the rim or embankment inclosing the spring, through which, in April, 1899, he conducted its waters into a "kind of a trail or swale that the snow water had made through there, and run it through this channel to" his premises, a quarter to half a mile distant, to be used, and which was used, for watering stock and other purposes, the surplus evaporating or disappearing in the ground without reaching any natural water course. In May, 1899, he filed what he intended to be a notice of location of all the waters of the spring, but which proved insufficient for want of a definite description, and soon thereafter contracted with some workmen to enlarge and develop the spring. and lay pipe therefrom to his premises, so as to preserve all the water for use during the summer months, when it was his only natural supply. Before, however, any of this work was done, with the exception of opening out and enlarging the trench previously dug, the defendant took up the land on which the spring is situated as a homestead, and forbade plaintiff from taking or using the water therefrom. The defendant, in his answer and testimony, admits the existence of the spring, and says that at the time he entered upon the premises there was about an inch and a half of water flowing from it through an opening in the rim or embankment down to the plaintiff's premises. The court below decided in favor of the defendant, holding that the waters of the spring were not subject to appropriation, for the reason that there is no natural stream flowing therefrom, and it is not tributary to, nor does it form a part of, any natural water course. The argument is, in effect, that the waters of a perennial spring are not subject to appropriation unless they flow in a natural channel. or form part of a water-course. There seem to be but few cases in which the rights of the appropriator of the waters of such a spring, as against a subsequent grantee of the government, have been considered. If the water rises to the surface, so as to form a stream, it may, of course, be appropriated, De Necochea *v.* Curtis, 80 Cal. 397, even by the construction of ditches up to the spring, Ely *v.* Ferguson, 91 Cal. 187. And in Cross *v.* Kitts, 69 Cal. 217, 58 Am. Rep. 558, the right to acquire title to percolating

waters by appropriation is recognized, so far, at least, as to entitle the grantee of the water right to hold the same against a subsequent grantee of the mining claim on which the water was brought to the surface. But it was subsequently held that no right can be acquired by appropriation to the waters of a spring formed by percolation. Railroad Co. *v.* Dufour, 95 Cal. 615, 19 L. R. A. 92. In the latter case, however, the question was as to the sufficiency of an alleged appropriation of water on state land under the statute of California, and may, perhaps, on that ground, be distinguished from the case in hand. A decision directly in point is that of Sullivan *v.* Northern Spy Mining Co., 11 Utah 438, 30 L. R. A. 186, in which it is held that the discoverer of a flow of percolating water on public lands may, by digging wells and improving them, and constantly using the water for beneficial purposes, acquire a right to take it from such wells as against one who, by subsequent location, acquires title to the land. The principle upon which this decision is grounded is that, where one goes upon public, unoccupied land of the United States, and diverts the water thereon from its natural source, and puts it to some beneficial use, he thereby acquires a right (which has been recognized by the legislation of congress, Rev. Stat. U. S., secs. 2339, 2340) to continue such diversion and use as against a subsequent settler upon the land; and it is unimportant whether the diversion is from a natural water course, or a spring, or a well formed by percolation. Whatever doubt may exist elsewhere upon the question, it would seem that the right to make such an appropriation of waste, spring, or seepage water finds recognition in the legislation of this state. The act of 1893 (Sess. Laws 1893, p. 150) governing the right of priority to waste, spring, and seepage waters provides that all ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same laws relating to priority of right as ditches constructed for the purpose of utilizing the waters of running streams. Under this provision there would seem to be no distinction between the right to appropriate the waters of running streams and those of springs. The decree of the court below is therefore reversed, and one will be entered here in plaintiff's favor.

NIELSON ET AL. *v.* SPONER

1907. SUPREME COURT OF WASHINGTON

46 Wash. 14, *89 Pac.* 155, *123 Am. St.* 910

ROOT, J.: This action was brought by respondents, as lower riparian owners, to enjoin the appellant from unreasonably using and diverting the waters of Thomas (or Sponer) creek, a small stream flowing across the lands of appellant and respondents. From a judgment and decree in favor of respondents, this appeal is prosecuted.

It appears that there is very little water in said stream during the months of July, August and September; that at times during said period the appellant diverted said water for the purpose of irrigating his orchard. It is claimed by respondents that this water was diverted by means of a small ditch running through soil that was very porous, and which necessarily occasioned the loss and waste of much of the water; that the water was not returned to the creek, and consequently respondents could get no water for domestic purposes from said creek during the summer period, when the water was so diverted by appellant. The latter claims that during said summer months there is no water in the creek, excepting such as comes from a spring situated upon his premises, and contends that he is entitled to take all of such water that is capable of being used upon his premises. He relies as authority for this upon sec. 4114 of 1 Ballinger's Ann. Codes and Stat., a part of which reads as follows: "Provided, that the person upon whose lands the seepage or spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands." This statute was enacted in 1890. The evidence in this case shows that respondents' land was patented in 1883, and that it has been occupied ever since. Under the common law, each riparian proprietor had a right to ordinary use for domestic purposes of water flowing in a defined stream past or through his land. In the case of Geddis *v.* Parrish, 1 Wash. St. 587, the Supreme Court of Washington Territory held that a lower riparian owner was entitled to, and could exercise, this right, even though the waters of such stream originated in a spring upon the land of the person seeking to divert them from the natural channel.

Under the authorities it would seem that the privileges of the respondents' predecessors to use the waters of the stream in question here was a property right running with the land from the time it was patented by the government in 1883. This being true, an act of the legislature in 1890, authorizing a land owner to use all the spring water arising on his land, and thereby destroying the use of such water to the lower riparian owner, would be uncon-

stitutional, as a taking or destroying of property without due process of law. Appellant had the right to make free use of this water, whether it came from a spring on his land or otherwise, for the ordinary domestic purposes; but we do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water, to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of prior legal appropriation. See Nesalhous *v.* Walker, 45 Wash. 621, decided by this court March 9, 1907; Smith *v.* Corbit, 116 Cal. 587; Shotwell *v.* Dodge, 8 Wash. 337; Benton *v.* Johncox, 17 Wash. 277, 39 L. R. A. 107, 61 Am. St. 912; Union Mill Co. *v.* Ferris, 2 Sawy. (U. S.) 176, Fed. Cas. No. 14371; Howe *v.* Norman, 13 R. I. 488; Brosnan *v.* Harris, 39 Ore. 148, 54 L. R. A. 628, 87 Am. St. 649; Ellis *v.* Tone, 58 Cal. 289; Harris *v.* Harrison, 93 Cal. 676; Lord *v.* Meadville Water Co., 135 Pa. St. 122, 8 L. R. A. 202, 20 Am. St. 867; Pomeroy, Water Rights, sec. 134; Gould on Waters, secs. 205, 536.

The judgment of the Superior Court is affirmed.

Hadley, C. J., and Fullerton, Crow, Dunbar and Mount, JJ., concur.

MORRISON *v.* OFFICER

1906. SUPREME COURT OF OREGON

48 Ore. 569, 87 Pac. 896

MOORE, J.: This is a suit by Finlay Morrison against Floyd L. Officer to enjoin interference with the use of water issuing from a spring. The facts are that, on December 5, 1894, the state of Oregon executed to the defendant a deed to the northwest quarter of the southeast quarter of section 36 in township 11, south of range 25 east in Grant county, ever since which he has been the owner in fee thereof. The state, on February 15, 1901, also entered into a contract with the plaintiff for the sale of the northeast quarter of the southeast quarter of that section, township and range, and five years thereafter he dug a ditch from a swale on the land last described, and conducted to a part thereof water which he intended to use in irrigating a garden. The defendant thereafter cut two ditches on his land from such swale, and diverted all the water therein, whereupon this suit was commenced, resulting in a decree as prayed for in the complaint, and he appeals.

The testimony shows that a perennial spring issues from the defendant's land at a point about 120 yards from the east line thereof,

the water from which reaches a point about 150 yards on the plaintiff's premises where it disappears. Though there is a conflict in the testimony, we think the great weight thereof supports the defendant's contention that the water does not usually appear on the surface, but, issuing from the spring on the side of a hill, it makes its way, without channel or banks, through brush and grass, moistening the ground, for a space about thirty feet in width, the distance mentioned, and that where cattle have made tracks in the damp soil, water may be seen, but it does not flow until confined in a ditch. No controversy exists as to the quantity of water which the spring affords, for each party admits that it does not exceed three-fourths of an inch, miners' measurement. The statute, regulating the use of water, contains the following clause: "Provided, that the person upon whose land seepage or spring waters first arise, shall have the right to the use of such waters." B. & C. Comp. sec. 5019. This act was passed February 22, 1893 (Laws Ore. 1893, p. 150), when the state was the owner in fee of the lands hereinbefore described. The clause adverted to is, in our opinion, a grant of the exclusive right to the use of the unappropriated water specified, to the person upon whose land such water first arises, and was probably a recognition of a practice prevailing in the arid region of the United States, that the title to lands containing water issuing from the sources mentioned had been secured, so that the water might be used for domestic or stock purposes, and that the quantity indicated did not appear to the legislative assembly to be more than was reasonably necessary to supply such use.

When a spring furnishes a stream of water that rises to the surface, the right of appropriation attaches, Brosnan *v.* Harris, 39 Ore. 148, 54 L. R. A. 628, 87 Am. St. 649, but where, as in the case at bar, the admitted quantity is so insignificant that a surface stream is impossible, when spread over the width of ground mentioned, the use of the water belongs to the person upon whose land it first arises. A small part of plaintiff's land was, before the diversion, moistened by water from the spring, and it is possible that such portion might be classed as a "water-course," on the theory that the law of gravitation compelled the water to take that direction because of the conformation of the land. The testimony shows, however, that there are no banks to such course on plaintiff's premises, and, unless there is a bank or ripa on his land, he can not be a riparian proprietor within the meaning of that term. The disposal of the use of water may be controlled by the legislature when its acts designed for that purpose do not violate the fundamental law by trenching upon the rights of property, and believing that in the present instance, the clause of the statute quoted does not invade such provisions, and that the plaintiff secured his contract of purchase with knowledge of the act, the decree is reversed and the suit dismissed.

BLOODGOOD *v.* AYRES ET AL.

1888. COURT OF APPEALS OF THE STATE OF NEW YORK

108 *N. Y.* 400, 15 *N. E.* 433, 2 *Am. St.* 443

FINCH, J.: * * * Upon defendant's premises, and something over a hundred feet from plaintiff's line, there was a living spring, which came up out of the earth, and was carried by a short leader to a trough, which had long served as a watering-place for the stock of defendant and previous owners. At that trough, or within a few feet of it, all the waste or surplus water sank into the ground and disappeared. What became of it was in no manner obvious to the senses until by digging and experiment a probability was established. About a hundred feet from the spring, and within perhaps twenty feet of plaintiff's line, water appeared upon the surface, sometimes seen to be in motion towards a sluice under the fence arranged for the passage of surface water mainly, or in part at least. At that sluice the water, except in times of freshet, again disappeared, but came to the surface about twenty feet on plaintiff's side of the line, and at the point where his spring or reservoir was established. His experiments, which he details, make it strongly probable that by percolation or subterranean currents, more or less of the water of defendant's spring reached the plaintiff's spring or reservoir; but the fact, if it be one, is established only as the result of inference or reasoning. In this state of affairs the defendant carried the waters of his spring to his house for domestic uses, and so, it is claimed, intercepted the supply of plaintiff's reservoir, and for that alleged wrong this action was brought. The general term held that it could not be maintained, and we are of the same opinion. No stream or watercourse ran from the spring. The source from which it came, and the flow of its waste or surplus, were alike underground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface; and none of the rules relating to water-courses, and their diversion, apply. Broadbent *v.* Ramsbotham, 34 Eng. Law & Eq. 553; Rawstron *v.* Taylor, 33 Eng. Law & Eq. 435; Delhi *v.* Youmans, 45 N. Y. 363; Goodale *v.* Tuttle, 29 N. Y. 466; Ellis *v.* Duncan, 21 Barb. 234; Barkley *v.* Wilcox, 86 N. Y. 147. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur. But, outside of these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water-courses, and they may be

intercepted or diverted by the owner of the land for any purpose of his own. The case first above cited resembled the present one in the feature that the action was to prevent the interception and diversion of certain sources of supply reaching a water-course known as "Longwood brook." One of these was a swamp or wet piece of ground which the opinion describes as "merely like a spring, so to speak, fixed on the side of a hill;" and of the subterranean courses communicating with the swamp, which certainly existed, it was deemed a sufficient answer that they were "not traceable so as to show the water passing along them ever reaching Longwood brook." Another source of supply was described as a stream welling out of the ground at a depth of about two feet, which flowed into a receiving basin, three feet square, used as a watering place. In those respects it resembled the spring in the present case; but, unlike that, the surplus and waste, instead of disappearing in the ground, followed ditches and depressions in the surface until it reached the brook. Both supply sources were intercepted and diverted, and a right of action therefor denied,—as to the first, on the ground that the subterranean currents were concealed, and not traceable; and the second, upon the distinct proposition that the owner might intercept or stop them before they reached a natural water-course. In Village of Delhi *v.* Youmans, supra, it was said that the owner of land might lawfully intercept percolations or underground currents. The reasons and justification of the doctrine are well stated in Acton *v.* Blundell, 12 Mees. & W. 324. They are that, as the water does not flow openly in the sight of the owner of the soil under which it passes, there is no ground for implying consent or agreement between the adjoining proprietors, which is one of the foundations on which the law of surface streams is built; that a different rule would enable a lower proprietor to prevent the upper owner from using the water in his own soil, and expose him to loss and danger in making improvements on his own land; and a further reason is found in the indefinite nature of the right claimed, and the great extent of obligation which would be incurred. The law in other states is in accordance with the views here expressed. Haldeman *v.* Bruckhart, 45 Pa. St. 514; Greenleaf *v.* Francis, 18 Pick. 117; Frazier *v.* Brown, 12 Ohio St. 294; Chatfield *v.* Wilson, 28 Vt. 49; Roath *v.* Driscoll, 20 Conn. 533. And the rule is strongly stated in Ang., Water-courses, ch. 4, sec. 114, as being that "the owner of land on which a spring issues from the earth has a perfect right to it against all the world except those through whose land it comes; and has a right to it even as against them until it comes in conflict with their enjoyment of their own property." The proposition, while very broadly stated, and somewhat open to criticism, embodies the substance of the prevailing doctrine as to the right of the owner to intercept and divert underground currents and

percolations for his own uses, without responsibility to a lower proprietor.

The judgment of the general term should be affirmed, and judgment absolute rendered for the defendant, with costs.

All concur.

COMSTOCK ET AL. *v.* RAMSAY

1913. SUPREME COURT OF COLORADO

55 *Colo.* 244, 133 *Pac.* 1107

BAILEY, J.: The contest is over seepage waters, and the right to use the river channel as a way through which to carry them. The site of the dispute is on the South Platte river, a short distance down the stream and east of the town of La Salle, in Weld county. The land upon which these waters accumulate is a strip of river bottom, varying in width from one-half to three-fourths of a mile and comprising several hundred acres, situated in water district No. 2. The bank of the river along which this land lies has been built up by accumulations from the river of silt and debris, until it is slightly higher than the land itself immediately adjacent thereto and extending back to the mesa.

The testimony shows that at an early day, prior to any extended irrigation in that vicinity, this land was comparatively dry in low water times, but when the river was high it was frequently overflowed, the waters of the river passing over it, covering at times practically all of this land except the higher portions along the bank and immediately next to the channel of the river; and that in wet seasons there would be water in the sloughs or depressions in the bottom, having a general drainage with the course of the river, toward a point at or near the headgate of the Highland ditch, some two or three miles down the stream. The evidence shows that the flow of water in this course is undoubted, the slope of the land being toward the river in a diagonal direction to the northeast. About the year 1878 an irrigating ditch, known as the Lower Latham, was constructed upon the upper or second bench lands, immediately above and south of the bottom lands referred to. A little later the Union, another irrigating ditch, was constructed south and west of the Lower Latham ditch. In 1890 a large irrigating reservoir, known as the Lower Latham reservoir, covering six or seven hundred acres, was constructed immediately south of these lands, some two miles away, and higher than the two ditches above described. These ditches and the reservoir take their supply of water from the South Platte river. The testimony shows that as irrigation became general upon the mesa above from the Union and Latham ditches, seepage

soon appeared upon the bottom lands and increased each year until 1890 and 1891, when the land was largely seeped and swampy, and a portion of it had grown up in cat-tails and swamp grass and was unfit for cultivation. After the Lower Latham reservoir was constructed, seepage upon this land began to largely increase. It became very heavy and destructive. Water flowed upon the land to a depth of three or four feet in places, and covered more than two hundred acres of it. Some time in 1894, a man by the name of Joshua New purchased a portion of the land lying just above the headgate of the Highland ditch, which is about four miles down the river from the headgate of the Lower Latham ditch, and constructed a dike across the south end of this land to prevent the seepage water and the river overflow coming upon it, and cut a ditch or channel through the bank of the river just above the dike, so the water accumulating above it could flow through to the river. Some of the water apparently did pass through this cut for several years, but the ditch became more or less filled up and did not serve to adequately drain the accumulated surface water.

This bottom land is underlaid with the ordinary coarse river sand and gravel, and undoubtedly, as indicated by the evidence, was once a part of the regular river channel. The soil upon top of this river sand and gravel is not of great depth, varying from none at all, at points where the sand and gravel itself appears on the surface, to a depth in places of three to four feet. This land is from five to six feet higher than the surface flow of the river at normal stage.

Generally during the months of July, August and September of each year, as shown by the testimony, the South Platte river is very low, and in the use of its waters for irrigation the entire flow is diverted at the headgate of the Lower Latham ditch, which is taken out of the river some two and one-half or three miles above this land; but notwithstanding such total diversion of the flow of the river there is sufficient return water to the stream, by seepage through the sands and gravel, to make from twenty-five to thirty-five second cubic feet of surface flow at a point immediately above the headgate of the Highland ditch, a distance down the river from the Lower Latham headgate, as already indicated, of about four miles. This shows a return of something over six second cubic feet of water to the mile. By reason of this return flow there is and has been for many years sufficient water in the river to supply the priorities awarded to the Patterson ditch, just above the Highland and the Highland ditch itself, both of which are senior to the second priority awarded to the Lower Latham ditch; yet the Lower Latham, by reason of such return waters, has never been required, since 1883, to turn down any water from its dam to supply earlier priorities diverting water below this bottom land. All the waters of the South Platte river have been appropriated, and the entire

normal flow of the river is inadequate to supply the priorities for irrigation purposes already decreed from it. There is no natural stream flowing into the river between the headgates of the Lower Latham and Highland ditches. All the water found at the headgate of the Highland ditch, after the Lower Latham ditch has diverted the entire flow of the stream, must be return, seepage and waste water, coming, undoubtedly, in a large measure, from the seeped bottom lands under consideration.

In 1907 Messrs. Gordon and Varvel, who were owners of a portion of this bottom land, completed the construction of a ditch, practically through the center of the land and paralleling the river, commonly known as the Gordon and Varvel seepage ditch, for the purpose of draining those lands and acquiring the right to the use for irrigation of the waters taken from them. The drainage ditch is not to exceed three-quarters of a mile from the river at its farthest point, and at other places comes within a fifth of a mile of it. These parties also procured deeds from some of the owners of lands adjoining theirs, conveying to them all their right to the seepage, drainage and percolating waters on such adjacent lands, and also rights of way across them for seepage ditches. This seepage ditch, therefore, was constructed not only on the Gordon and Varvel land, but as well on the lands of adjacent owners. It is admitted that, because of the physical condition which obtains in reference to these lands, the seepage water in question can not be used to irrigate them, but that the only manner in which they can be applied to a beneficial use is by discharging them into the South Platte river, using the river as a carrier, and diverting them at a point down the stream, where they could be used to advantage in irrigating land which is without a proper water supply.

Below the Latham headgate the Patterson and Highland ditches, in district No. 2, having decreed priorities, take practically all of the water of the river coming to their respective headgates. Between their headgates and the east line of water district No. 2 from fifteen to twenty feet accumulate in the South Platte river, by return and seepage water, and at such east line of water district No. 2 about twenty feet come into the South Platte from the Poudre river, which accumulates in the latter river by return and seepage water below the headgate of the Ogilvy dam, which is the lowest ditch taking water from the Poudre river.

The ditches taking water from the South Platte river in district No. 1, immediately below district No. 2, all have priorities of such junior date that they are bound to rely, during the low water season, for their supply upon the waters coming into the river below the Highland headgate and from the Poudre river below the Ogilvy headgate, and the other accumulations to South Platte after it passes into district No. 1. This water supply is not sufficient to furnish the decreed priorities in district No. 1, and in fact the testimony shows that many of the larger ditches are closed

during the low water period. It is also worthy of notice that about one hundred and fifty second cubic feet of water is required to flow out of district No. 1 and into district No. 64, the next district down the river, to supply earlier priorities in the latter district. It is, therefore, apparent that any interference with the tributaries to, or the taking of the supply of water from, the South Platte river at the point mentioned would have an injurious effect upon the appropriators of water from the river below with priorities already decreed.

Ramsay, appellee here, plaintiff below, had a tract of dry land under the Duel and Snyder ditch, diverting water from the South Platte river at a point near Fort Morgan, in water district No. 1. This seepage water, and whatever right they had to the use of the river to carry it, together with their rights of way for the seepage ditch across the bottom land in question, was by Gordon and Varvel conveyed by deed to Ramsay, who procured an easement and license from the owners of the Duel and Snyder ditch for the conveyance of this water, to be applied to a beneficial use on his land under that ditch. The purpose was to bring the seepage water to the Duel and Snyder ditch by using the river as a carrier ditch. Ramsay requested the water commissioners of water districts Nos. 1 and 2, the division irrigation engineer of irrigation division No. 1, and the state engineer, to allow him to take from the river, at the headgate of the Duel and Snyder ditch, the seepage water which he had discharged therein, less a proper and reasonable deduction for evaporation, which they declined to do. Thereupon this action was brought in the District Court of Weld county, to compel these officers to recognize the use of the river as a carrier for these waters, and thus permit the perfection of plaintiff's initiated right. The officers appeared and objected that certain water owners were interested and necessary parties, and, on motion, all water users on the river, with appropriations between the points where the seepage waters were discharged into the river and where purposed to be diverted, were made parties. Demurrers to the bill having been overruled, the defendants, who were appropriators and users of water between those points on the river, answered, setting up that the waters sought to be so diverted were tributary to the South Platte river, and that the diversion thereof was an interference with a tributary of that stream, from which they were decreed prior appropriators and adversely affected by such interference. The fact that they were such appropriators was admitted, but plaintiff Ramsay contended that the water taken was in no sense a tributary or source of supply of or to the river. Upon this proposition the case was tried and determined. The real issue is whether the waters in question were tributary to the river, and that is the only one which we shall consider or determine, for if Ramsay has no right to divert this water, because such diversion would be an adverse interference

with the rights of prior appropriators from the river, then he is entitled to no relief.

The court below found the issues for the plaintiff, and entered a decree accordingly. It is to review that decree that the case is brought here by the users and appropriators with decreed rights down the river.

There is no actual dispute, in any proper sense, upon the facts which are controlling in, or necessary or material to, a determination of this case. The real question arises rather upon an application of the law to the facts. The trial court, among others, made this finding:

"That in 1906 after the construction of said reservoir a large amount of seepage and percolating waters appeared on said lands, which naturally, prior to the construction of said artificial waterworks, was dry and free from surface water and used for raising farm crops, and flooded about 200 acres of said land, said water standing permanently to a depth of from a few inches to three feet upon said land, there being no artificial, surface or subterranean channel carrying it to said river; the court further finds that said water is derived from water escaping from said artificial sources and that it is not a tributary of said South Platte river. The court finds that there is no interference with the water table of the South Platte river and no water is diverted from said river or its underlying water table in the gravel adjacent thereto, nor is the flow of water in or to said river in any way interfered with or diminished by reason of the construction, operation and maintenance of said seepage ditch, nor by the use of said ditch, nor by the use of said river as a conduit for said seepage water, nor by the diversion of said water into the Duel and Snyder ditch hereinafter permitted."

As throwing further light upon the manner in which the court regarded this seepage water, we quote what the trial judge said, during the progress of the hearing, respecting it, just prior to the entry of the formal findings and decree:

"Seepage water in this valley, if continued long enough and there was enough of it, some time some part of it would eventually reach the river. Can it be said for that reason, that all such water is a tributary, and no one can use it, although it is not yet flowing into the river? I think not. * * * This ditch does not interfere in any way with the body of underground water sustaining, making and holding up the water level of the river. It does not draw from that water level. The first effect of the ditch was to draw off the artificial lake, and now it collects the seepage water which made the lake. Merely because some of this water rises out of the gravel in the bottom of the ditch can make no difference. The ditch is higher than the river. The taking of this water is not a depletion of the natural waters of the stream and does not have that effect."

It is apparent from the foregoing quoted finding, and the oral statement of the trial judge as set out above, that the conclusions of the court were based upon the fact that the seepage waters under consideration were in a sense artificial, and not natural waters of the stream; that they had been brought from the river to their present position through artificial means, after once having been used by bona fide appropriators from the river, and that, therefore, they were not subject to the rights of other appropriators down the stream, and were not in fact a part of the river, for the purpose of supplying appropriations therefrom, that is, were not the natural waters of the stream and could not be called upon by decreed appropriators and users of water farther down the stream to supply their priorities. It appears from the statements of the trial judge that these waters had either already done so, or would at least eventually return to and become a part of the river; but it was held that until they had actually mingled with the waters of the stream they were subject to independent appropriations. The fact that this drainage ditch did not directly tap the river itself and withdraw water from it, or from the water table thereof, but only intercepted water in its course to the river, seems to have been decisive with the trial court that there was no interference with the river flow. That the river flow is as much affected by intercepting and diverting water, which otherwise would flow into it, as by directly withdrawing water from its channel, seems axiomatic. A judgment based upon the theory of the court as indicated above is unsound and can not be upheld. To do so would overthrow and nullify every fundamental principle upon which the rights of appropriators of water in the state for beneficial use rest. To maintain the doctrine of "first in time first in right," and protect the rights of prior appropriators from the stream, which have been fully adjudicated and recognized for years, and preserve, as vital to these rights, conditions upon our streams substantially as they were when such rights were acquired, and under which they have been maintained and perfected, as this court has consistently held must be done, requires a reversal of this judgment.

We take judicial notice of the fact that practically every decree on the South Platte river, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine, "first in time

first in right," and to substitute in its stead, fortunately, as yet, an unrecognized one, "last in time first in right."

It is clearly apparent from the entire testimony adduced that water flows continuously from the seeped land in question through the coarse sand and gravel underlying it to the river, and is one, at least, of its principal sources of supply. Upon the undisputed facts, considered in connection with the physical conditions shown to be present, it is self-evident that, agreeable to natural laws, this underflow has continued for years. Manifestly, since the testimony shows practically no other source of supply to the river between the headgate of the Lower Latham ditch and the headgate of the Highland ditch, the flow found at the headgate of the latter, after the former has diverted the entire river supply at its headgate, must accrue from seepage, return and waste water passing under and through this bottom land to the river. That such water is not only now, but for years has been, a material and substantial source of supply to the South Platte river, upon which the users down the stream, for irrigation purposes, have long depended and yet do depend to satisfy their decreed priorities, is too plain to need elaboration or further comment. These waters are not in any sense unappropriated waters; on the contrary, they have been appropriated and used over and over again.

Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees. To now permit independent appropriation and diversion of these waters in a way to adversely affect prior appropriations and decrees, is in direct conflict alike with the spirit of the law under which such priorities have been decreed and the practical purposes for which these appropriations have been made and recognized. It is a well known fact that practically all appropriations down the stream are dependent on return, waste and seepage waters for their supply. If a part of these waters may be cut off, then all of them may be, with the result that the stream might thus become wholly depleted, and all appropriations and decrees, no matter how early, below the points where such waters are diverted, would be stripped of their rights and rendered useless and of no practical worth or value.

There is no law anywhere to support the contention that if these waters are naturally tributary to the river, still they may be taken by a new claimant to the damage and injury of prior appropriators upon that stream, simply because he captures and diverts them before they actually get into the river channel. If such act of capture and diversion can be upheld as lawful and

proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream. When it is shown or admitted that these waters ultimately return to the river and thereby augment and replenish its flow, they are part and parcel thereof, whether the limit within which this occurs be short or long. The moment they are released by a user under an appropriation from the river, which has been duly decreed, and start back in their course to the stream, they become and are as much a part thereof as when they actually reach the stream. Whenever these waters start to flow back to the river and it is apparent they will reach it, they constitute a part of the stream and are not subject to independent appropriation as new or added water, or because they have been used to serve one priority and have been thus artificially brought into that position. It is asserted by the defendant in error that at the time of the construction of the seepage ditch the water sought to be thereby appropriated had not become tributary to the river, in the sense that it had not actually reached the river channel. The fact that it might ultimately do so is declared by him to be immaterial. This contention we can not approve, but as already indicated, we are rather of opinion that when such waters leave the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him, they immediately become a component part of the river, and can not be lawfully diverted from their course to it by independent appropriation, to the injury of those having decreed priorities therefrom.

We do not hold that there can be no independent appropriation of seepage, return and spring waters; but on the contrary, where such appropriation does not interfere with a prior right, that it may be done upon facts and conditions which warrant it. What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such bona fide appropriators and users of such waters and a new claimant, the former has the first and better right.

There is no pretense whatever that the appropriation and diversion attempted by plaintiff is based on the statute providing for the appropriation and usage of seepage, waste and spring waters arising upon the land of the owner, and therefore, since that statute is not directly or necessarily involved, we neither consider nor discuss it.

This opinion is based upon the facts of this particular case, and is intended for application to them and to cases involving similar

ones. The general doctrine announced is not to be unreasonably extended, or made to reach conditions where to apply it would be inequitable and unjust. It is rather to be looked to to bring about results fair to all, for the protection and preservation of vested rights, and the promotion of the general welfare and common good.

To the proposition that appropriators of water out of a natural stream for irrigation purposes, with the priorities decreed, are entitled to have the conditions substantially maintained upon the stream as they were when the appropriations were made, and have existed during the continuance and perfection of such appropriations, we cite the following authorities: Handy Ditch Co. *v.* Louden Irrigating Canal Co., 27 Colo. 515; Ft. Lyon Canal Co. *v.* Chew, 33 Colo. 392; New Cache La Poudre Irrigation Co. *v.* Water Supply and Storage Co., 29 Colo. 469; Baer Bros. Land and Cattle Co. *v.* Wilson, 38 Colo. 101; Cache La. Poudre Reservoir Co. *v.* Water Supply and Storage Co. et al., 25 Colo. 161, 46 L. R. A. 175, 71 Am. St. 131; Vogel et al. *v.* Minnesota Canal and Reservoir Co. et al., 47 Colo. 534.

Upon the proposition that the waters under consideration, as matter of fact, are tributary to the river and not subject to independent appropriation and diversion, when there is thereby an interference with the right of use by prior decreed appropriators from the stream for irrigation purposes, we cite the following: Ogilvy I. & L. Co. *v.* Insinger, 19 Colo. App. 380; McClellan *v.* Hurdle, 3 Colo. App. 430; Bruening *v.* Dorr, 23 Colo. 195, 35 L. R. A. 640; Clark *v.* Ashley, 34 Colo. 285; Platte Valley Irr. Co. *v.* Buckers I. M. & I. Co., 25 Colo. 77; Buckers I. M. & I. Co. *v.* Farmers' Independent Ditch Co., 31 Colo. 62; Burkhart *v.* Meiberg, 37 Colo. 187, 6 L. R. A. (N. S.) 1104, 119 Am. St. 279, and La Jara C. & L. Assn. *v.* Hansen, 35 Colo. 105.

The judgment is reversed and the cause remanded to the District Court of Weld County, with instructions to dismiss the bill.

Hill and Garrigues, JJ., not participating.

ROBERTS ET AL. *v.* GRIBBLE

1913. SUPREME COURT OF UTAH

43 Utah 411, 134 Pac. 1014

This is an action to restrain defendant from interfering with certain underflow or subterranean waters which pass beneath the surface of and through the defendant's land in Sanpete county, Utah, and to quiet the title of the waters in plaintiffs.

The court, among others, made the following findings of fact, which are undisputed:

"(2) That Sanpitch river is a natural stream of water, arising in the upper part of Sanpete county, Utah, and in its natural state flows southerly and westerly through Sanpete county and across the defendant's said lands and south of plaintiffs' said lands and into the Sevier river. * * *

"(3) That the normal or usual flow of water in said river, except as hereinafter stated, is diverted and used by persons not parties hereto above the respective points of diversion of the parties to this action. That during the spring season, and until about the middle of the month of June of each year, a considerable quantity of water, commonly called 'high water,' usually flows in said river to the points of diversion of the parties to this action, and portions thereof are claimed, diverted, and used for irrigation purposes by the plaintiffs and the defendant upon their said lands. * * * (The title or right to the use of the 'high water' is not involved in this action.)

"(4) That previous to the year 1905 no water habitually flowed in said river to the respective points of diversion of the parties hereto, except the said 'high water,' and that up to that time said river was usually dry in the vicinity of the plaintiffs' and defendant's said lands after the said 'high water' season was over as aforesaid. That about the year 1905, on account of the irrigation of the surrounding lands, a quantity of water began to seep and percolate and now seeps and percolates into the channel of said river, during the latter part of the summer of each year, at and below the defendant's said lands and, when not interfered with, flows down said river to the point of diversion of the plaintiffs, where the same has been diverted and used by plaintiffs, for the necessary irrigation of their said lands, ever since the said year 1905."

The court also made and filed the following findings of fact:

"(5) That in the month of June, 1910, the defendant constructed a number of wells by driving perforated pipe into the earth a short distance south and away from the channel of said Sanpitch river and in a natural depression upon the lands of said defendant and constructed a ditch leading therefrom, whereby a quantity of water varying in amount, but not exceeding one cubic foot per second of time, was developed from the percolating waters of his said soil and the waste from the irrigation of his said lands, which said water ever since has been and now is conducted by said defendant to and upon his said lands for the necessary irrigation thereof. That the water does not flow from said wells or through said ditch of defendant except during and immediately following the irrigation of the defendants' lands lying above.

"(6) That the said waters developed and used by said defendant, as aforesaid, never reached said Sanpitch river by any known or defined channel or course previous to the development and use thereof by the said defendant as aforesaid."

As conclusions of law the court found: (1) That the waters developed and used by the defendant are percolating waters arising from his own lands, and (2) that the development and use thereof were and are no invasion or violation of any right of the plaintiffs. Judgment in conformity with the findings of fact and conclusions of law was rendered in favor of defendant. To reverse the judgment, plaintiffs prosecute this appeal.

* * * * * * *

McCARTY, C. J. (after stating the facts as above): Appellants contend that the underground waters tapped by, and which flow from, respondent's wells are waters that flow in a known and defined channel beneath the surface of the river bed, and that these waters, when not diverted by the wells or otherwise interfered with, rise to the surface in the river channel below respondent's lands and flow down to appellants' dam and into their canal; that the water, therefore, is not subject to appropriation by respondent, and hence the court erred in finding on the issues in favor of respondent. On the other hand, respondent contends that the evidence clearly shows that the waters in question are waste waters that seep and percolate from lands above and in the vicinity of the land upon which the wells are situated, and hence he has not only the legal right to drain his land of these waters, but also the right to divert and make a beneficial use of them when thus collected.

* * * * * * *

It is conceded that the high water period in that part of the state usually extends from early springtime to about the 15th day of June. Counsel for appellants in his brief, referring to the stream during its normal flow, says: "The evidence * * * shows without contradiction that, at a point from a mile and a half or two miles above the defendant's land, all the waters of Sanpitch river are diverted from the main channel and are conveyed through canals for the irrigation of the lands lying south and southwest from the town of Gunnison, including lands of the defendant, and that said irrigated lands bordered upon the main channel of the Sanpitch river." The court found, and the finding is neither disputed nor complained of, that in the year 1905, on account of the irrigation of the lands referred to by counsel, seepage water appeared on defendant's lands, and that this water flowed down the river channel and, when not interfered with, was diverted by appellants. And the undisputed evidence also shows that, because of the increased irrigation of the lands mentioned in recent years, much of defendant's land, and especially that portion lying within

and immediately south and southwest of the bend of the river, became swampy and marshy and unfit for cultivation. On this point the defendant testified in part as follows: "In 1907 the water appeared and destroyed our crops. In 1908 and 1909 we didn't put any in at all. The water was all over it (the land) shoe-top deep. During these years water appeared in the channel of the river all along where I drove these wells. * * * The wells were driven by driving a pipe in the ground from nine to twenty-five feet. * * * The wells are along the bend that used to be the channel of this river. It (the water) has run through every year in the channel of the creek, commencing three years ago."

Another witness testified: "Previous to three or four years ago there never used to be any water running in the bed of Sanpitch river after the high water season."

Reuben Christensen, one of the plaintiffs, testified regarding the amount of seepage water in the river channel prior to the year 1905 as follows: "The water for our land was scarce after the high water in Sanpitch river, and lots of years we did not get any."

N. C. Sorensen, a witness for respondent, referring to the river channel at and above plaintiffs' dam, testified: "I have crossed the river (channel) * * * hundreds of times during the summer and fall. I have seen the water flowing there, but not in the dry seasons—not in the low-water season. I mean the dry years and when high water is over. It would be dry practically every year up to the last five or six years."

Regarding the effect that the driving of the wells had on the seepage water that submerged his land, respondent testified as follows, and this testimony is not disputed: "It was perfectly dry in fifteen days after I drove the pipe; that is, the water (disappeared) that was standing on my fields."

The evidence shows that water flows from the wells during the irrigation seasons only. When the crops are matured and the farmers, including respondent, cease irrigating their farms for the season, the water stops flowing from the wells. On this point respondent testified, and his testimony is not disputed: "This water seems to fluctuate with the irrigation above. When we irrigate above, the wells flow a good big flow. The first time we watered this spring it was about six feet to the water in these wells, and the first time it raised a little over two feet, and the next time about the same, and the third time it came to the top and began to flow, and it increased in the creek gradually all over, and the wells flow a little now (August 4, 1911). I have not been able to use it this year because there is not enough to run in the ditch at all. It is a dryer season and not enough water coming up in the land."

We think the evidence both for appellants and respondent tends to show that the waters in dispute are seepage and percolating waters. These waters rose in such quantities on respondent's land that it became submerged and was rendered unfit for the raising

of hay and other farm products. The respondent undoubtedly had a right to drain his land of the water and put it in a condition for raising crops. Whether he did this by sinking wells or by digging drain ditches was of no concern to appellants. The water thus developed or collected being waste water which seeps and percolates into respondent's land from adjoining lands, he had the legal right to make whatever beneficial use of it he deemed proper, and he did not invade any right of appellant's by so doing. We think the right to the use of the water in this case comes squarely within the rule announced in the case of Garns *v.* Rollins, 125 Pac. 867, recently decided by this court.

The judgment is affirmed, with costs to respondent.[78]

Straup and Frick, JJ., concur.

[78] See La Jara Creamery and Live Stock Assn. *v.* Hansen, 35 Colo. 105, 83 Pac. 644; Burkart *v.* Meiberg, 37 Colo. 187, 86 Pac. 98, 6 L. R. A. (N. S.) 1104, 119 Am. St. 279, p. 319, supra; Anderson Land, &c., Co. *v.* McConnell, 188 Fed. 818; Garns *v.* Rollins, 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915c, 1159n; Bidleman *v.* Short (Nev.), 150 Pac. 834; Colo. Rev. Stat. 1908, § 3177, N. Mex. Laws 1907, p. 89, § 53; Wiel, Water Rights (3d ed.), § 55.

CHAPTER V

INTERSTATE STREAMS—FEDERAL AND STATE POWERS OF CONTROL

HOWELL *v.* JOHNSON ET AL.

1898. CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MONTANA

89 *Fed.* 556

This is a bill to enjoin the diversion of the water of a stream to which the complainant claims the right by prior appropriation. Heard on demurrer to the bill.

* * * * * * *

KNOWLES, District Judge: The plaintiff is a citizen of the state of Wyoming. The defendants are all citizens of the state of Montana. In his bill of complaint, plaintiff sets forth that he is the owner of certain lands in the state of Wyoming, and that, for the purposes of irrigating the same, he appropriated certain waters of a creek called "Sage Creek." This creek has its sources in Montana, and flows for some distance within its boundaries before it enters the state of Wyoming. Plaintiff's ditch and point of diversion of said waters are both within said last-named state. Defendants settled along the line of said creek, in Montana, subsequent to the appropriation of plaintiff, and in said state have diverted, it is alleged, the waters of said creek, and prevented the same from flowing down to plaintiff's ditch and land. Plaintiff has sued defendants in this court, and asks to have them enjoined from so diverting said waters. Defendants have filed a demurrer to this bill.

The points presented in this demurrer are that plaintiff, having a water right acquired under and by virtue of the laws of Wyoming, can not come into this court to enforce the same. It is also claimed that the rights pertaining to this water are under the control of the legislative power of Montana.

Considering the first point, it is urged that the right of plaintiff, being acquired under and by virtue of the laws of the state of Wyoming, can be enforced only as to citizens of Wyoming, and not against citizens of Montana, who have diverted water only in Montana. Is the right claimed by plaintiff one which accrues only by

virtue of the laws of Wyoming? Plaintiff alleges that he made his appropriation of the waters of said creek in accordance with the laws of Wyoming and of Montana. Allowing that there could be no appropriation of the waters of said creek made in Wyoming under or by virtue of the laws of Montana, still the allegation that the appropriation was made under the laws of Wyoming remains. According to the bill, plaintiff's appropriation was made on the 1st day of August, 1890. At that date secs. 2339 and 2340 of the Revised Statutes were in force. They provided:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

In the case of Basey *v.* Gallagher, 20 Wall. 670, the Supreme Court said in regard to this act: "The act of congress of 1866 recognized the right to water by prior appropriation for agricultural and manufacturing purposes as well as mining;" and also decided that if the right to appropriate water for any of the purposes named was recognized by either local customs, or by the legislation of any state or territory, or by the decisions of the court, it would be sufficient. The allegation in the bill that the water was appropriated under the laws of the state of Wyoming would meet the requirements of the said act of congress. Up to the date of the passage of said act of 1866, the right of the prior appropriator to use water, for any of the purposes above named, had, in the arid and mining regions of the West, been recognized as against any other person claiming the same, but not as against the national government. This act, coupled with the act of July 9, 1870, embodied in said sec. 2340, recognized the right of the prior appropriator of water upon the public domain, even as against the United States and its grantees, if said appropriation was authorized by the statute of the state where the appropriation was made. Black's Pom. Water Rights, sec. 25; Osgood *v.* Mining Co., 56 Cal. 571. The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.

The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national gov-

ernment is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper.

In Black's Pom. Water Rights, sec. 32, it is said:

"As the federal government, in conveying any particular portion of its public domain within a state to a particular grantor, may, as proprietor, annex any condition to the conveyance so that the title will be taken and held subject thereto, so it may, by congressional legislation, adopt any general regulations imposing any limitations or conditions upon the use of the public domain to all persons, or upon all persons, who acquire title to portions of the public domain from the government, and the title so acquired will be held by the grantees thereof subject to such conditions and limitations. Thus, congress may provide by general statute for a right of way over the public lands unsold for the ditches and canals of those who have made a prior appropriation of water, and that all grantees who subsequently acquire portions of this land shall take and hold their titles subject to such existing right of way, or that all grantees of public lands bordering upon a stream shall take and hold their titles subject to any previously existing appropriation of its waters."

These views are supported by the case of Mining Co. *v.* Ferris, 2 Sawy. 176, Fed. Cas. No. 14371.

The federal government is not restrained in the disposal of its lands by state laws or state lines. Its laws upon this subject apply to the lands in one state as well as another. It has made grants of land extending through several states. The state governments can not restrict it in the primary disposal of its lands. If it may sell and dispose of its land as it may deem proper, there is no reason why it may not sell a part thereof as an incident thereto, such as the use of water flowing over the same. That it has the same right as any real estate proprietor would be self-evident. It is apparent, then, according to the allegations of the bill, that plaintiff acquired rights by appropriation in Sage creek to which all who have acquired land upon the same, or water rights therein, subject to his appropriation, must be subordinate. His rights have the sanction of the national government.

It is urged that in some way the state of Montana has some right in these waters in Sage creek or some control over the same. It never purchased them. It never owned them. In support of this view the court is cited to a great many decisions which pertain to navigable rivers and lakes and tide waters. Here we approach a different subject. There is no claim that Sage creek is a navigable stream. A state, upon its admission into the Union, acquires, by

virtue of its sovereign powers, the title to the beds of all navigable rivers, lakes, and tide waters within its boundaries, subject, however, to its rights of commerce and navigation. This title gives it, to some extent, a control over the waters of such rivers and lakes, and the power to establish and determine what shall be the riparian rights which shall pertain to those who hold the title to lands bordering on the same. The case of St. Anthony Falls Water-Power Co. *v.* Board of Water Com'rs of St. Paul (decided Nov. 29, 1897, by the Supreme Court), 18 Sup. Ct. 157, was one which pertained to the rights of the plaintiff in that case, as the owner of lands upon the border or banks of the Mississippi river. This river was held to be a navigable stream, and all of the rights of the state of Minnesota grow out of that fact. In that case it was held that the riparian rights of the owner of land bounded by any navigable river depended upon the laws of the state where such land was located. In that case it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the land through which any innavigable stream flowed, within the boundaries of any state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana can not step in, and say, "The right to the water of Sage creek, which the plaintiff acquired under the laws of congress, you can not exercise in this state." This would be the taking of plaintiff's property from him without due process of law. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he appropriated flow down to him to the point of his diversion. The defendants, according to the allegations in the bill, are violating this rule, and should be enjoined.

The idea that there can arise any international water right question in the case of the waters of an innavigable stream can not be maintained. The right to such waters, after the national government has disposed of them, must always be a private question. For these reasons the demurrer in this case is overruled.[74]

[74] See Anderson *v.* Bassman, 140 Fed. 14; Turley *v.* Furman, 16 N. Mex. 253, 114 Pac. 278.

BEAN ET AL. *v.* MORRIS ET AL.

1911. SUPREME COURT OF THE UNITED STATES

221 U. S. 485, 31 Sup. Ct. 703, 55 L. ed. 821

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Montana, enjoining the diversion of the water of an interstate stream.

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Mr. Justice Holmes delivered the opinion of the court:

This suit was brought by the respondent Morris, to prevent the petitioners from so diverting the waters of Sage creek in Montana as to interfere with an alleged prior right of Morris, by appropriation, to 250 inches of such waters in Wyoming. Afterwards the other respondent, Howell, was allowed to intervene and make a similar claim. Sage creek is a small creek, not navigable, that joins the Stinking Water in Wyoming, the latter stream flowing into the Big Horn, which then flows back northerly into Montana again, and unites with the Yellowstone. The circuit court made a decree that Morris was entitled to 100 inches miner's measurement, of date April, 1887, and that, subject to Morris, Howell was entitled to 110 inches, of date August 1, 1890, both parties being prior in time and right to the petitioners. 146 Fed. 423. On appeal the findings of fact below were adopted and the decree of the circuit court affirmed by the circuit court of appeals. 86 C. C. A. 519, 159 Fed. 651.

It was admitted at the argument that, but for the fact that the prior appropriation was in one state, Wyoming, and the interference in another, Montana, the decree would be right, so far as the main and important question is concerned. It is true that some minor points were suggested, such as laches, abandonment, the statute of limitations, etc., but the findings of two courts have been against the petitioners upon all of these, and we see no reason for giving them further consideration. So we pass at once to the question of private water rights as between users in different states.

We know no reason to doubt, and we assume, that, subject to such rights as the lower state might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the state of Montana has full legislative power over Sage creek while it flows within that state. Kansas *v.* Colorado, 206 U. S. 46, 93-95, 51 L. ed. 956, 973, 974, 27 Sup. Ct. 655. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. Missouri *v.* Illinois,

200 U. S. 496, 521, 50 L. ed. 572, 579, 26 Sup. Ct. 268; Rickey Land and Cattle Co. *v.* Miller & Lux, 218 U. S. 258, 260, 54 L. ed. 1032, 1037, 31 Sup. Ct. 11. But with regard to such rights as came into question in the older states, we believe that it always was assumed, in the absence of legislation to the contrary, that the states were willing to ignore boundaries, and allowed the same rights to be acquired from outside the state that could be acquired from within. Mannville Co. *v.* Worcester, 138 Mass. 89, 52 Am. Rep. 261; Thayer *v.* Brooks, 17 Ohio, 489, 49 Am. Dec. 474; Slack *v.* Walcott, 3 Mason 508, 516, Fed. Cas. No. 12932; Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13446; Rundle *v.* Delaware and R. Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12139, 14 How. 80, 14 L. ed. 335; Foot *v.* Edwards, 3 Blatchf. 310, Fed. Cas. No. 4908. See Wooster *v.* Great Falls Mfg. Co., 39 Maine 246, 253; Armendiaz *v.* Stillman, 54 Tex. 623; State *v.* Lord, 16 N. H. 357; Howard *v.* Ingersoll, 17 Ala. 780, 793. There is even stronger reason for the same assumption here. Montana can not be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage creek, flows back into that state. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory, Rev. Stat. secs. 2339, 2340, U. S. Comp. Stat. 1901, p. 1437; act of March 3, 1877, ch. 107, 19 Stat. at L. 377, U. S. Comp. Stat. 1901, p. 1548, and is recognized by both states now. Before the state lines were drawn, of course, the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either state was admitted to the Union. The only reasonable presumption is that the states, upon their incorporation, continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed. See Willey *v.* Decker, 11 Wyo. 496, 100 Am. St. 939; Smith *v.* Denniff, 24 Mont. 20, 50 L. R. A. 741, 81 Am. St. 408.

It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state, if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in Rickey Land and Cattle Co. *v.* Miller & Lux, 218 U. S. 258, 261, 54 L. ed. 1032, 1038, 31 Sup. Ct. 11. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat. Other matters adverted to in argument, so far as not disposed of by what

we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion, and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave.

Decree affirmed.[73]

KANSAS *v.* COLORADO ET AL.

1907. SUPREME COURT OF THE UNITED STATES

206 U. S. 46, 27 Sup. Ct. 655, 51 L. ed. 956

Statement by Mr. Justice Brewer:

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas, Kans. Laws 1901, ch. 425, and upon leave obtained, the state of Kansas filed its bill in equity in this court against the state of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. 552. In delivering the opinion of the court the chief justice disclosed in the following words the general character of the controversy, and the conclusions arrived at, p. 145, L. ed. p. 846, Sup. Ct., p. 559:

"The gravamen of the bill is that the state of Colorado, acting directly herself as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas river through its channel on the surface, and through a subterranean course across the state of Kansas; that this is threatened not only by the impounding and the use of the water at the river's source, but as it flows after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the state of Kansas as an individual owner, and on all the inhabitants of the state, and especially on the inhabitants of that part of the state lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands

[73] Cal. Civ. Code, § 1410a. The entire flow of water in any natural stream which carries water from the state of California, into any other state is subject to use in the state of California, under the laws of the state of California, and the right may be, so far as not already acquired by use in the state of California, acquired and held under the laws of the state of California. The rights to the use of such water held under the laws of the state of California, shall be prior and superior to any rights to the waters of such streams held under the laws of any other state. (Added by Stats. 1913, p. 93.)

lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado, in doing this, is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

"The state of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream; and while she concedes that this rule has been modified in the Western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common-law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado can not absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

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On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and, after that had been taken and abstracts prepared, counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.

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Mr. Justice Brewer delivered the opinion of the court:

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first, of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the states are becoming frequent, and, in the rapidly changing conditions of life

and business, are likely to become still more so. Involving, as they do, the rights of political communities which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between states.

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Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for, if the case against Colorado fails, it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas river into Kansas. If that be true, then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow, has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right, is the amount of appropriation that it is now making such an infringment upon the rights of Kansas as to call for judicial interference? Is the question one solely between the states, or is the matter subject to national legislative regulation? and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the nation has the right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two states, in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several states," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural water ways and preserve the navigability of those ways.

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It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas river is not now and never was

practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas river, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as, in its judgment, is needful for the reclamation of all these arid lands, and, for that purpose, to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

"That the doctrine of riparian rights is unapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or nonriparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two states *inter sese* in regard to the flow of waters in the Arkansas river is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." Story, J., in Martin *v.* Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102. "The government of the United States is one of delegated, limited, and enumerated powers." United States *v.* Harris, 106 U. S. 629, 635, 27 L. ed. 290, 292, 1 Sup. Ct. 601, 606.

Turning to the enumeration of the powers granted to congress by the 8th section of the 1st article of the constitution, it is enough to say that no one of them, by any implication, refers to the reclamation of arid lands.

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We must look beyond sec. 8 for congressional authority over arid lands, and it is said to be found in the second paragraph of sec. 3 of art. 4, reading: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and

nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within her limits. Appreciating the force of this, counsel for the government relies upon "the doctrine of sovereign and inherent power;" adding, "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article, to-wit, "the people." Its principle purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares

who framed it,—"we, the people of the United States," not the people of one state, but the people of all the states; and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.

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At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised.

It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of sec. 3 of art. 4, heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits

of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in Gutierres *v.* Albuquerque Land & Irrig. Co. 188 U. S. 545, 554, 47 L. ed. 588, 593, 23 Sup. Ct. 338, 341, after referring to previous legislation:

"It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902, 32 Stat. at L. 388, ch. 1093, U. S. Comp. Stat. Supp. 1905, p. 349. That act appropriated the receipts from the sale and disposal of the public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands. The 8th section of the act is as follows:

" 'Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state, or of the Federal government, or of any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' "

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

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It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state.

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In the argument on the demurrer counsel for plaintiff endeavored to show that congress had expressly imposed the common law on all this territory prior to its formation into states. See also the opinion of the Supreme Court of Kansas in Clark *v.* Allaman, 71 Kans. 206, 70 L. R. A. 971. But when the states of Kansas and Colorado were admitted into the union they were admitted with the

full powers of local sovereignty which belonged to other states, Pollard *v.* Hagan and Shively *v.* Bowlby, supra; Hardin *v.* Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. 685, and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two states, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for, or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because congress can not determine the rule which shall control between the two states, or because neither state can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states. Indeed, the disagreement, coupled with its effect upon a stream passing through the two states, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several states. This contention was made in Western U. Teleg. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561, in which it was asserted that, as congress, having sole jurisdiction over interstate commerce, had prescribed no rates for interstate telegraphic communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said:

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress. * * * Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of congress? We are clearly of opinion that this can not be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

What is the common law? Kent says, vol. 1, p. 471:

"The common law includes those principles, usuages, and rules of action applicable to the government and security of persons and

property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As congress can not make compacts between the states, as it can not, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In The Paquete Habana, 175 U. S. 677, 700, 44 L. ed. 320, 328, 20 Sup. Ct. 290, 299, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion in the demurrer in this case, Chief Justice Fuller said:

"Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri *v.* Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either

Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what rights such private ownership of property might give.

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It is the state of Kansas which invokes the action of this court, charging that, through the action of Colorado, a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the 11th amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia *v.* Tennessee Copper Co., 206 U. S. 230, ante, 618, 27 Sup. Ct. 618.

This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective states, and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question

properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished, and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that, by the use of which he had appropriated the water, he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow, and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two states. Colorado could not be upheld in appropriating the entire flow of the Arkansas river, on the ground that it is willing to give, and does give, to Kansas, something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two states, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas river, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which, by the taking of water from the Arkansas river, and in no other way, can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas valley, a benefit from water as great as that which would inure from keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit from the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water. To illustrate, the early settlers of Kansas territory found that farming was unsuccessful unless confined to its eastern 100 or 120 miles. West of that crops were almost always a failure; but now that region is the home of a large population, with crops as certain as those elsewhere, and yet this change has not been brought about by irrigation. A common belief is that the original sod was largely impervious to water; that when the spring rains came the water, instead of sinking into the

ground, filled the water courses to overflowing and ran off to the Gulf of Mexico. There was no water in the soil to go up in vapor and come down in showers, and the constant heat of summer destroyed the crops; but after the sod had once been turned the water from those rains largely sank into the ground, and then, as the summer came on, went up in vapor and came down in showers, and so, by continued watering, prevented the burning up of the growing crops. We do not mean to say that science has demonstrated this to be the operating cause, or that other theories are not propounded, but the fact is that, instead of stopping at a distance of 120 miles from the Missouri river, the area of cultivated and profitably cultivated land has extended from 150 to 200 miles further west, and seems to be steadily moving towards the western boundary of the state. Now, if there is this change gradually moving westward from the Missouri river, is it altogether an unreasonable expectation that, as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri river and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country? Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty, and as not unreasonably trespassing upon any rights of Kansas? And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two states are as here disclosed.

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As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she can not complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. The Arkansas river, from its source to the eastern end of the Royal gorge, is a mountain torrent, coming down between rocky banks and over a rocky bed. Along this distance it is of comparatively little use for irrigation purposes. After it debouches from the Royal gorge it enters a valley, in which it wanders from one side to the other through eastern Colorado, southwestern Kansas, and into Oklahoma, with but a slight descent, and presenting but little opportunities for the development of water power through falls or by dams. Its length in Kansas is about 350 miles, and the descent is only 2,320 feet, or less than seven feet to a mile. There

are substantially no falls, no narrow passage ways in which dams can be readily constructed for the development of water power; and while there are some in eastern Colorado, yet they are of little elevation, and mainly to assist in the storing of water for purposes of irrigation. So that, if the extreme rule of the common law were enforced, Oklahoma, having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meager amount required for domestic purposes, would flow through eastern Colorado and Kansas of comparatively little advantage to either state, and both would lose the great benefit which comes from the use of the water for irrigation. The drainage area of the Arkansas river in Colorado is 26,000 square miles; in Kansas, 20,000 square miles; and all this area, unless the stream can be used for purposes of irrigation, would be left to the slow development which comes from the cultivation of the soil.

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It can not be denied, in view of all the testimony (for that which we have quoted is but a sample of much more bearing upon the question), that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet, when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

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Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams can not be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the state of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, yet, to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both states, and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may right-

fully call for relief against the action of Colorado, its corporations and citizens, in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered, will be one dismissing the petition of the intervener, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas river. The decree will also dismiss the bill of the state of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that, through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river. Each party will pay its own costs.

In closing, we may say that the parties to this litigation have approached the investigation of the questions in the most honorable spirit, seeking to present fully the facts as they could be ascertained from witnesses, and discussing the evidence and questions of law with marked research and ability.

Mr. Justice White and Mr. Justice McKenna concur in the result.

Mr. Justice Moody took no part in the decision of this case.

RICKEY LAND AND CATTLE COMPANY *v.* MILLER AND LUX

1910. SUPREME COURT OF THE UNITED STATES

218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032

On writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the Circuit Court for the District of Nevada, restraining proceedings in suits in the California courts over water rights in an interstate stream on the ground that the federal court had acquired jurisdiction before the California actions were begun.

Mr. Justice Holmes delivered the opinion of the court:

These cases are brought to this court by certiorari. The facts material to the understanding and decision of them are these: Miller & Lux is a corporation using the water of the Walker river in Nevada, and claiming rights in the same. The two branches of this river, known as East Fork and West Fork, rise in California and unite in Nevada above Miller & Lux. One Rickey used the water of both of these branches in California, and claimed rights superior to those of the parties lower down on the stream. On June 10,

1902, Miller & Lux brought a bill in equity in the Circuit Court for the District of Nevada against Rickey and certain other defendants, some of whom are respondents in the second of the present cases, to enjoin interference with its use of water. Rickey appeared, pleaded to the jurisdiction that the diversion of water by him was in California (127 Fed. 573), and, later, answered. But, after appearing, he, with other members of his family, organized the petitioning corporation, and he conveyed his lands and rights in California to it. On October 15, 1904, this corporation began two actions in a state court of California against Miller & Lux, the defendants in the bill of Miller & Lux other than Rickey, and others, to quiet its title and establish its prior right to 1,575 cubic feet per second on the West Fork, and to 504 feet on the East Fork. In December, a few days before they were served with process in the last-mentioned suits, other defendants in the bill brought by Miller & Lux brought a cross bill against their codefendant Rickey to establish their priority as against him. In 1906, the bills in these present cases were brought by Miller & Lux, and defendants other than Rickey in the original Miller & Lux suit, to restrain proceedings in the California actions, on the ground that the United States court for Nevada had acquired jurisdiction before the California actions were begun. Injunctions were granted as prayed, and now are before this court for review. 81 C. C. A. 207, 152 Fed. 11, affirming 146 Fed. 574, 581, 588.

The petitioner contends that there is no conflict of jurisdiction, and that the proceedings in the California court should go on. Its argument is this: When a right is asserted in favor of land in one jurisdiction over land in another, different principles are involved from those that suffice when both parcels are subject to the same law. When such rights have been recognized, it has been on the ground of an assumed "concurrence between the two states, the one, so to speak, offering the right, the other permitting it to be accepted. Manville Co. *v.* Worcester, 138 Mass. 89," 52 Am. Rep. 261. Missouri *v.* Illinois, 200 U. S. 496, 521, 50 L. ed. 572, 579, 26 Sup. Ct. 268. But still there are two parcels of land subject to different systems of law; and although the rights and liabilities in respect of each may require a consideration of the other if they are to be dealt with completely, the fact remains that each may be regulated by the state where the land lies according to its sovereign will. Kansas *v.* Colorado, 206 U. S. 46, 93, 51 L. ed. 956, 973, 27 Sup. Ct. 655. If, then, the courts of one state are about to deal with one parcel, they should not be indirectly interfered with by a foreign court that has no power to control the use of the *res*. It is said to be a general principle that apart from some privity, such as is created by contract, trust, or fraud, courts of equity recognize the impropriety of using their power over the person to achieve such a result. Northern Indiana R. Co. *v.* Michigan C. R. Co., 15 How. 233, 242-

244, 14 L. ed. 674-679; Carpenter *v.* Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. 960; Norris *v.* Chambres, 29 Beav. 246, 253, 254; Norris *v.* Chambres, 3 De G. F. & J., 583, 584. It is conceivable, to be sure, that the decisions of this court may determine that the states have rights as against each other *in invitum* in streams that flow through the land of both. Kansas *v.* Colorado, 206 U. S. 46, 84, 51 L. ed. 956, 969, 27 Sup. Ct. 655; Missouri *v.* Illinois, 200 U. S. 496, 519, 520, 50 L. ed. 572, 578, 579, 26 Sup. Ct. 268. These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common-law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older states. See New York *v.* Pine, 185 U. S. 93, 96, 46 L. ed. 820, 821, 22 Sup. Ct. 592. There may be some, perhaps limited, right of appropriation in the upper state, at least in the watershed of the stream, where irrigation is the condition of using the land. See Kansas *v.* Colorado, 206 U. S. 46, 100-104, 117, 51 L. ed. 956, 975-977, 983, 27 Sup. Ct. 655. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his state, and those rights, the petitioner insists, can or at least should be, determined only in a suit brought by the state itself.

But if for any reason the foregoing argument should not have prevailed as against Rickey if he had brought the actions in California after the beginning of the suit in Nevada, the present petitioner is not affected by the proceedings against Rickey, as they were purely personal, and did not concern a purchaser of land outside the jurisdiction. To affect a purchaser with a suit against a vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court, in which the suit is brought. See Fall *v.* Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 30 Sup. Ct. 3.

We are of opinion that the petitioner fails to establish the conclusion for which it contends. The alleged rights of Miller & Lux involve a relation between parcels of land that can not be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary to enforce it must be done in California, and require the assent of that state so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada. But, leaving the latter possibility on one side, if California recognizes private rights that cross the border line, the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement. Great Falls Mfg. Co. *v.* Worster, 23 N. H. 462. Full justice can not be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken

in hand. To adjust the rights of the parties within the state requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.

We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states. Prout *v.* Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. 398; Ex parte Young, 209 U. S. 123, 161, 162, 52 L. ed. 714, 729, 730, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. 441.

As to the argument that the Rickey Land Company is not affected by any priority that may have been gained as against Rickey, it might be a question, even if the petitioner was a purchaser without notice, whether the purchaser would not be confined to asserting its rights in the pending cause. See Whiteside *v.* Haselton, 110 U. S. 296, 301, 28 L. ed. 152, 154, 4 Sup. Ct. 1. But in this case, if the judge below was of opinion as matter of fact on what appears that the institution of the petition was merely a device to dodge the jurisdiction of the Nevada court, and that the Rickey Land & Cattle Company was merely Rickey under another name, we could not say that his finding was wrong.

It is urged that the cross bills on which the bill and injunction in the second case were based were not maintainable because not in aid of the defense to the original suit of Miller & Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller & Lux, still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller & Lux from working injustice. See further, Ames Realty Co. *v.* Big Indian Min. Co., 146 Fed. 166. The cross bills being maintainable, the jurisdiction in respect of them follows that over the principal bill.

Decrees affirmed.

CONANT ET AL. *v.* DEEP CREEK AND CURLEW VALLEY IRRIGATION CO. ET AL.

1901. SUPREME COURT OF UTAH

23 Utah 627, 66 Pac. 188, 90 Am. St. 721

MORSE, District Judge. It appears from the record in this case that in April, 1896, the respondent Henry Conant and one Edward Conant commenced an action in the district court of Oneida county, in the state of Idaho, to quiet their title to certain waters flowing through the channel of a stream or creek commonly called "Deep Creek" or "Curlew Creek," which rises in Oneida county, Idaho, and flows through a portion of that county into Box Elder county, Utah, in which action all the appellants appeared, either as defendants or as complainants in intervention, and each claimed to be the owner and entitled to the possession and use of certain portions of the waters of said stream, and all participated in the trial of said cause. A number of persons, residents of the state of Idaho, who claimed and diverted water from said stream in said state, were also made parties defendant in said action. The water claimed by the appellants Deep Creek & Curlew Irrigation Company and Curlew Irrigation & Manufacturing Company was diverted from said stream at points in Oneida county, Idaho, and was used by them for irrigation purposes in Oneida county, Idaho, and in Box Elder county, Utah, and the waters claimed by the respondents Henry Conant and said Edward Conant, as well as the waters claimed by all the other appellants, were diverted from said stream at points in Box Elder county, Utah. On August, 6, 1896, a decree was rendered and entered in said action awarding to the plaintiffs and to each of the defendants and interveners therein specific quantities of the waters of the flow of said stream, and quieting their titles thereto, and directing the method of measuring and diverting the same, from which decree no appeal was taken, and the same became final in the Idaho court. On the 15th of August, 1899, the respondents commenced this action in the district court of Box Elder county, basing their complaint upon the decree entered in the Idaho court, and praying for a decree in accordance therewith; and from such a decree entered by said district court this appeal is taken.

The principal question presented by this appeal is, did the Idaho court have jurisdiction to try and determine the title and right to the use of the water flowing in that portion of Curlew creek situated within Box Elder county, Utah, and diverted therefrom in said county, and used for irrigation upon lands located therein, and to quiet the title thereto? A right to divert and use the waters of a stream, acquired by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made. Bear

Lake & River Waterworks & Irrigation Co. *v.* Ogden City, 8 Utah 494; Tucker *v.* Jones, 8 Mont. 225; Sweetland *v.* Olsen, 11 Mont. 27; Cave *v.* Crafts, 53 Cal. 135; Simmons *v.* Winters, 21 Ore. 35. "The terms, 'land,' 'real estate,' and 'real property,' include land, tenements, hereditaments, water rights, possessory rights and claims." Subdivision 10, sec. 2498, Rev. Stat. An action, therefore, to quiet the title and determine and to establish the right to divert and use water for such purposes is in the nature of an action to quiet the title to real estate, and must be commenced and prosecuted in the courts of the state in which the same is situated. The courts of one state are without jurisdiction to hear and determine suits affecting the title to lands in another state. Nelson *v.* Potter, 50 N. J. L. 324. In the case of Lindley *v.* O'Reilly, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. 802, it is said: "The decree in a suit of this aspect imposes a mere personal obligation, enforcible by injunction, attachment, or like process against the person, and can not operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer, or vest a title." In Davis *v.* Headley, 22 N. J. Eq. 115, the complainant obtained a decree in the Circuit Court of Kentucky against Headley that a conveyance of lands in New Jersey, made by the complainant, should be rescinded and set aside, the possession restored, and the defendant enjoined from setting up the conveyance. He then filed a bill in the Court of Chancery in New Jersey to enforce the decree. The jurisdiction of the parties by the Kentucky court was undisputed. The bill to enforce the decree was nevertheless dismissed. Chancellor Zabriskie, in dismissing the bill, declared that: "It is a well-settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations (and thus part of the *jus gentium*), that immovable property known to the common law as 'real estate' is exclusively subject to the laws and jurisdictions of the courts of the nation or state in which it is located. No other laws or courts can affect it. I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree." In Carpenter *v.* Strange, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. 966, Chief Justice Fuller, delivering the opinion of the court, says: "The real estate was situate in Tennessee, and governed by the laws of its *situs;* and while, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within his jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court has no inherent power by the mere force of its decree to annul a deed or to establish a title. Hence, although, in cases of trusts, of contract, and of fraud, the jurisdic-

tion of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated. * * * The courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee exclusively subject to its laws and the jurisdiction of its courts." It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we can not agree. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another state, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights. Howell *v.* Johnson, 89 Fed. 556. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto; and by the decree entered in the suit in the district court of Oneida county, Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law can not be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this state, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this state, and, in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit.

The respondents contend that the appellants, by having interpleaded in the Idaho case, and participated in the trial thereof, are estopped by the force of that adjudication from questioning it. Jurisdiction of the subject-matter of a suit can not be conferred by consent; neither can the want of such jurisdiction be waived. White *v.* Seely, 1 Utah 191; Konold *v.* Railway Co., 16 Utah 151; Hawes, Jurisd., secs. 9, 10, 12, 239; 1 Freem., Judgm., sec. 120; 1 Black, Judgm., secs. 217, 218; 12 Enc. Pl. & Prac., p. 127. It is ordered that the decree of the district court be set aside, and the case remanded, with directions to dismiss the suit, and that respondents pay costs.

Baskin and Bartch, JJ., concur.

WATER RIGHTS

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Art. 1, Sec. 8.—The Congress shall have power:

* * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *.

* * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Sec. 10. * * * No state shall, without the consent of congress, * * * enter into any agreement or compact with another state or with a foreign power. * * *

Art. II, Sec. 2. The president. * * *

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-third of the senators present concur; * * *.

Art. IV, Sec. 3. * * * The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

Art. VI. * * * This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

AMENDMENTS:—

Art. V. No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Art. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Art. XIV, Sec. 1. * * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *

* * * * * * *

Sec. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Constitution of the State of California (1879)

Art. XIV, Sec. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is

hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law. * * *

Constitution of the State of Wyoming

Art. I, Sec. 31. Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.

Art. VIII, Sec. 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

UNITED STATES *v.* RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

1899. SUPREME COURT OF THE UNITED STATES

174 *U. S.* 690, 19 *Sup. Ct.* 770, 43 *L. ed.* 1136

Appeal from the Supreme Court of the Territory of New Mexico.

* * * * * * *

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

* * * * * * *

Obviously, the only matter of fact which the court attempted to determine (and that determination appears to have been based partly upon the affidavits and documents filed and partly upon judicial notice) was that the Rio Grande river was not navigable within the limits of the territory of New Mexico, and, so determining, it adjudged and decreed that the complainant's bill was without equity. In other words, finding that the Rio Grande river was not navigable within the limits of the territory of New Mexico, and that the averments of the bill in that respect were not true, it held that, conceding all the other averments of the bill to be true, the plaintiff was not entitled to relief.

The Supreme Court of the territory, as appears from its opinion, held that the Rio Grande river was not navigable within the limits of the territory of New Mexico; that, therefore, the United States had no jurisdiction over the stream; and that, assuming its non-navigability within the limits of the territory, the plaintiff was not, under the other facts set forth in the bill, entitled to any relief. Whatever criticisms may be expressed as to the form in which the

proceedings were had and the decree entered, these distinctly appear as the matters decided by the trial and Supreme Courts, and to them, therefore, our inquiry should run.

The trial court assumed to take judicial notice that the Rio Grande was not navigable within the limits of New Mexico. The right to do this was conceded by the counsel for the government, on the hearing below—a concession which the attorney general, on the argument before us, declined to continue. The extent to which judicial notice will go is not, in all cases, perfectly clear. * * *

It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence, and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river, is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or one that ought to be generally known? If not, it should be determined by evidence. Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico. The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river. * * *

Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox river, which was considered in The Montello, in which was an abundant flow of water and a general capacity for navigation along its entire length, and, although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream, in its ordinary condition susceptible of use for general navigation purposes. We are not, therefore, disposed to question the conclusion reached by the trial court and the Supreme Court of the territory, that the Rio Grande, within the limits of New Mexico, is not navigable.

Neither is it necessary to consider the treaty stipulations between this country and Mexico. * * * Such questions might, under some

circumstances, be interesting and important; but here the Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being, where navigable, the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligations of the United States to preserve, for their own citizens, the navigability of its navigable waters, is certainly as great as any arising by treaty or international law to other nations or their citizens, and, if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty to Mexico, they also constitute an equal injury and wrong to the people of the United States.

We may, therefore, properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the government to interfere. * * * In other words, the bill charges that the defendants, at the places where they proposed to construct their dam, intend thereby to appropriate all the waters of the Rio Grande, and defendants qualify that charge only so far as they say that most of the flow of the river is already appropriated, and they only propose to take the balance. The bill charges that such appropriation of the entire flow will seriously obstruct the navigability of the river from the place of the dam to the mouth of the stream. The defendants deny this, but as the court found that there was no equity in the bill, and dismissed the suit on that ground, we must, for the purposes of this inquiry, assume that it is true, that defendants are intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable. The right to do this is claimed by defendants and denied by the government, and that, generally speaking, is the question presented for our consideration.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * *

While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common-law rule, and permit any specific and separate appropriation of the waters of a stream, belongs also to the legislature of a territory, we do not deem it necessary, for the purposes of this case, to inquire. We concede arguendo that it does.

Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized: First, that, in the absence of specific authority from congress, a state can not, by its legislation,

destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water-courses of the country, even against any state action. It is true there have been frequent decisions recognizing the power of the state, in the absence of congressional legislation, to assume control of even navigable waters within its limits, to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the state to thus legislate for the interests of its own citizens is conceded, and until in some way congress asserts its superior power, and the necessity of preserving the general interests of the people of all the states, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. * * *

All this proceeds upon the thought that the nonaction of congress carries with it an implied assent to the action taken by the state.

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule,—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the state, nothing is presented which calls for any consideration by the federal courts. In 1866, congress passed the following act (14 Stat. 253; Rev. Stat., sec. 2339):

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any

ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water. In respect to this, in Broder *v.* Water Co., 101 U. S. 274, 276, it was said:

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In 1877 an act was passed for the sale of desert lands, which contained in its first section this proviso (19 Stat. 377):

"Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

On March 3, 1891, an act was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided (26 Stat. 1101):

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory which shall have filed, or may hereafter file, with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and

all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

Obviously, by these acts, so far as they extended, congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that congress intended to release its control over the navigable streams of the country, and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts,—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries. To hold that congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable water-course, and so destroy the navigability of that water-course in derogation of the interests of all the people of the United States, is a construction which can not be tolerated. It ignores the spirit of the legislation, and carries the statute to the verge of the letter, and far beyond what, under the circumstances of the case, must be held to have been the intent of congress.

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890. On September 19, 1890, an act was passed containing this provision (26 Stat. 454, sec. 10):

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of

a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the attorney general of the United States."

As this is a later declaration of congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that congress meant that thereafter no state should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of nonnavigable streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government. It was an exercise by congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute, as well as in the act of July 13, 1892 (27 Stat. 88, 110), provide for the mode of asserting that control. It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that, although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the national government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government, enacted the statute in question; and it would be to improperly ignore

the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity, under the direction of the attorney general of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceeding are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument, this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson river runs within the limits of the state of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it, and contributes to the volume of its waters, is the Croton river, a nonnavigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably, the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise, and its power to restrain such appropriation be unquestioned; and, within the purview of this section, it would become the right of the attorney general to institute proceedings to restrain such appropriation.

Without pursuing this inquiry further, we are of the opinion that there was error in the conclusions of the lower courts; that the decree must be reversed, and the case remanded, with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and, if so, to enter a decree restraining those acts to the extent that they will so diminish.

Mr. Justice Gray and Mr. Justice McKenna were not present at the argument, and took no part in the decision.[76]

[76] See Miller and Lux *v.* Enterprise Canal, &c., Co., 142 Cal. 208, 75 Pac. 770, 100 Am. St. 115.

WINTERS ET AL. *v.* UNITED STATES

1908. SUPREME COURT OF THE UNITED STATES

207 U. S. 564, 28 Sup. Ct. 207, 52 L. ed. 340

Statement by Mr. Justice McKenna:

This suit was brought by the United States to restrain appellants and others from constructing or maintaining dams or reservoirs on the Milk river in the state of Montana, or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation.

An interlocutory order was granted, enjoining the defendants in the suit from interfering in any manner with the use by the reservation of 5,000 inches of the water of the river. The order was affirmed by the Circuit Court of Appeals. 74 C. C. A. 666, 143 Fed. 740. Upon the return of the case to the circuit court, an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer, upon which and the bill a decree was entered making the preliminary injunction permanent. The decree was affirmed by the Circuit Court of Appeals. 78 C. C. A. 546, 148 Fed. 684.

The allegations of the bill, so far as necessary to state them, are as follows: On the 1st day of May, 1888, a tract of land, the property of the United States, was reserved and set apart "as an Indian reservation as and for a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the state, (then territory) of Montana, designated and known at the Fort Belknap Indian Reservation." The tract has ever since been used as an Indian reservation and as the home and abiding place of the Indians.

* * * * * * *

In 1889 the United States constructed houses and buildings upon the reservation for the occupancy and residence of the officers in charge of it, and such officers depend entirely for their domestic, culinary, and irrigation purposes upon the water of the river. In the year 1889, and long prior to the acts of the defendants complained of, the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miner's inches, and conducted it to the buildings and premises, used the same for domestic purposes and also for the irrigation of land adjacent to the buildings and premises, and by the use thereof raised crops of grain, grass, and vegetables. Afterwards, but long prior to the acts of the defendants complained of, to wit, on the 5th of July, 1898, the Indians residing on the reservation diverted from the river for the purpose of irrigation a flow of 10,000 miner's inches of water to and upon divers and extensive tracts of land, aggregating in amount about 30,000 acres, and raised upon said lands crops of

grain, grass, and vegetables. And ever since 1889 and July, 1898, the United States and the Indians have diverted and used the waters of the river in the manner and for the purposes mentioned, and the United States "has been enabled by means thereof to train, encourage, and accustom large numbers of Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement." It is alleged with detail that all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created, and that in furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them, it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

It is alleged that, "notwithstanding the riparian and other rights" of the United States and the Indians to the uninterrupted flow of the waters of the river, the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and, by means of canals and ditches and water ways, have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof. And this diversion of the water, it is alleged, has continued until the present time, to the irreparable injury of the United States, for which there is no adequate remedy at law.

The allegations of the answer, so far as material to the present controversy, are as follows: That the lands of the Fort Belknap Reservation were a part of a much larger area in the state of Montana, which, by an act of Congress, approved April 15, 1874 [18 Stat. at L. 28, ch. 96], was set apart and reserved for the occupation of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians, but that the right of the Indians therein "was the bare right of the use and occupation thereof at the will and sufferance of the government of the United States." That the United States, for the purpose of opening for settlement a large portion of such area, entered into an agreement with the Indians composing said tribes, by which the Indians "ceded, sold, transferred, and conveyed" to the United States all of the lands embraced in said area, except Fort Belknap Indian Reservation, described in the bill. This agreement was ratified by an act of Congress of May 1, 1888 [25 Stat. at L. 113, ch. 213], and thereby the lands to which the Indians' title was thus extinguished became a part of the public domain of the United States and subject to disposal under the various land laws, "and it was the purpose and intention of the government that the said land should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed, and cultivated, and communities of civilized persons be established thereon."

That the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company were qualified to become settlers upon the public land and to acquire title thereto under the homestead and desert land laws of the United States. And that said corporations were organized and exist under the laws of Montana for the purpose of supplying to their said stockholders the water of Milk river and its tributaries, to be used by them in the irrigation of their lands.

That the defendant the Empire Cattle Company is a corporation under the laws of Montana, was legally entitled to purchase, and did purchase, from those who were qualified to acquire them under the desert and homestead land laws of the United States, lands on the Milk river and its tributaries, and is now the owner and holder thereof.

That the defendants, prior to the 5th day of July, 1898, and before any appropriation, diversion, or use of the waters of the river or its tributaries was made by the United States or the Indians on the Fort Belknap Reservation, except a pumping plant of the capacity of about 250 miner's inches, without having notice of any claim made by the United States or the Indians that there was any reservation made of the waters of the river or its tributaries for use on said reservation, and believing that all the waters on the lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rulings, and customs of the state of Montana, in like manner as water on other portions of the public domain, entered upon the public lands in the vicinity of the river, made entry thereof at the United States land office, and thereafter settled upon, improved, reclaimed, and cultivated the same and performed all things required to acquire a title under the homestead and desert land laws, made due proof thereof, and received patents conveying to them, respectively, the lands in fee simple.

That all of said lands are situated within the watershed of the river, are riparian upon the river and its tributaries, but are arid and must be irrigated by artificial means to make them inhabitable and capable of growing crops.

That for the purpose of reclaiming the lands, and acting under the laws of the United States and the laws of Montana, the defendants, respectively, posted upon the river and its tributaries, at the points of intended diversion, notices of appropriation, stating the means of diversion and place of use, and thereafter filed in the office of the clerk and recorder of the county wherein the lands were situated a copy of the notices, duly verified, and within forty days thereafter commenced the construction of ditches and other instrumentalities, and completed them with diligence, and diverted, appropriated, and applied to a beneficial use more than 5,000 miner's inches of the waters of the river and its tributaries, or 120 cubic feet per second,

irrigating their lands and producing hay, grain, and other crops thereon.

* * * * * * *

It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained for stock and irrigation purposes, and particularly these: People creek, flowing about 1,000 inches of water; Big Horn creek, flowing about 1,000 inches; Lodge Pole creek, flowing about 600 inches of water; Clear creek, flowing about 300 inches. That all of the waters of these streams can be made available for use upon the reservation, and that it was not the intention of the government to reserve any of the waters of Milk river or its tributaries. That the respective claims of the defendants to the waters of the river and its tributaries are prior and paramount to the claims of the United States and the Indians, except as to 250 inches used in and around the agency buildings, and at all times there has been sufficient water flowing down the river to more than supply these 250 inches.

And it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than $100,000 to them, and if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage can not now be estimated, but will greatly exceed $100,000," and that they will be wholly without remedy if the claim of the United States and the Indians be sustained.

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Mr. Justice McKenna delivered the opinion of the court:

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The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. (It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people.) If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that

which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible. The government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it can not be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk river by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, "upon an equal footing with the original states." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be subject of appropriation by the citizens and inhabitants of said state, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. United States *v.* Rio Grande Dam & Irrig. Co., 174 U. S. 702, 43 L. ed. 1141, 19 Sup. Ct. 770; United States *v.* Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste, —took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union, and the power over the waters of Milk river which the state thereby acquired to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government.

Decree affirmed.[77]

Mr. Justice Brewer dissents.

PALMER ET AL. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL.

1914. SUPREME COURT OF CALIFORNIA

167 Cal. 163, 138 Pac. 997

SHAW, J. This is a proceeding under section 67 of the Public Utilities Act (Stats. Ex. Sess. 1911, p. 55) to review an order of the Railroad Commission dismissing a complaint which the petitioners filed and presented to the Commission.

In their complaint the plaintiffs alleged that said water company was engaged in the business of distributing and selling water for public use for irrigation, domestic, and other purposes in San Diego county; that it has in its possession and control large quantities of water appropriated to said use; that it obtained said water by virtue of notices of appropriation, posted as provided in the civil Code, in which the Otay valley was designated as one of the places of intended use; that the several plaintiffs own lands in the Otay valley below the level of the pipe lines of said company and within one mile thereof; that their lands require irrigation; that they desire to obtain water from said company for that and other beneficial purposes to be used on their said lands; that they have demanded the same from said company, offering to pay the established water rate therefor, but that the company refused to let them have any water, except on condition that they first deposit the cost of connecting the company's pipes with their lands. They further averred that they believed that they were legally entitled to receive from said company a portion of

[77] See Telluride Power, &c., Co. *v.* Rio Grande W. R. Co., 187 U. S. 569, 23 Sup. Ct. 178, 47 L. ed. 307; Light *v.* United States, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570; United States *v.* Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563; Los Angeles Farming & Milling Co. *v.* Los Angeles, 217 U. S. 217, 30 Sup. Ct. 452, 54 L. ed. 736; Hardin *v.* Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. ed. 428; Whitaker *v.* McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. ed. 857; Los Angeles *v.* Los Angeles Co., 152 Cal. 645, 93 Pac. 869; Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674.

said water. They asked the commission to fix a just rate of charges for such water, to order the company to supply water to them and others entitled thereto at such rates, to direct it to discontinue making any charge to consumers for connecting lines or for meters, and to forbid the company from charging a different rate for domestic use where water was also furnished to the same land for irrigation.

Upon the hearing it was agreed that the commission should first ascertain and determine whether or not the plaintiffs had the right to receive from the company the water they claimed. The principal dispute and the only matter of importance was the claim of the plaintiffs to receive water from the company for irrigation. Some three or four of them were and still are receiving water from the company for domestic use, but, as we understand the record, the commission found that they were still entitled to receive the water for that purpose, and so declared. The grievances relating to that use were not deemed of sufficient importance to justify an inquiry at that time by the commission, and it did not decide that no such right thereto existed. Upon the claim that the plaintiffs were entitled to water for irrigation, the commission, upon the evidence, determined that they did not have such right, and thereupon and for that reason refused to proceed with the application and dismissed the complaint.

We need not determine here whether or not the commission has judicial power authorizing it, in the course of its duties and for the purpose of determining whether or not it will entertain a complaint presented to it, to make an adjudication of the right of the complainants to the water service of which they ask regulation, or that the decision in this case is such an adjudication. If it appears upon the showing made to the commission and before this court that they had no such right thereto, the action of the commission in dismissing the proceeding should be sustained, regardless of the extent of the judicial power it may have.

The commission is not bound to investigate alleged abuses and make and enforce regulations for the conduct of a public utility at the instance of persons who have no interest in the service. If it wrongfully refuses to do so, the remedy of the aggrieved party would be mandamus, not certiorari. Mandamus is allowed by section 67 of the Public Utilities Act, for such refusal. We are of the opinion that the complainants, upon the showing made, have no right to receive water for irrigation of their lands. It may be that they still retain the right to an adjudication by a competent court, notwithstanding the decision of the commission and of this court in this proceeding.

The sole ground upon which they claim the right to a share of the water for such irrigation is that their lands are included in the places designated in the notices of appropriation posted by the company as the "places of intended use" of the water claimed in such notices. The theory of the plaintiffs is that this designation of places of intended use constituted a dedication of the waters claimed in the notice to

public use for the benefit of all the territory embraced in the designated places, and that, when water was thereafter diverted in pursuance of the notices, the persons owning lands within any of the places named have the right to demand a proportional share of such water for use upon such land. In this connection, plaintiffs argue that the waters flowing in nonnavigable streams in this state are by law deemed "public waters," devoted to public use for the benefit of the lands, whether contiguous or not, to which they can conveniently be conducted by artificial means; that it was perceived by the legislature that in many places the supply of water would be far too small to serve the entire accessible area, and that some method must be devised of determining the limits to which the dedication should extend; that for this purpose the provision was made in the Civil Code, requiring the person claiming the water and posting the notice to designate the place of use; and that it was intended that thereby the right to the supply should be divested from the general area of lands accessible to the supply and vested exclusively in the places designated.

The theory that the water of a nonnavigable stream in this state is in some sense "public water" has been advanced before. It has been claimed that a diversion of water under the provisions of the Civil Code (secs. 1410 to 1422) constitutes a grant of the water by the state to the appropriator. The idea may have arisen from the statement sometimes made in the decisions that the riparian owner has no right in the corpus of the water, Eddy *v.* Simpson, 3 Cal. 252, 58 Am. Dec. 408, and that running water can not be made the subject of private ownership; that the right to use the water of a stream "carries no specific property in the water itself," Kidd *v.* Laird, 15 Cal. 179, 76 Am. Dec. 472. This is far from saying that the property in the water is vested in the public, either for general use, or as property of the state. The doctrine that it is public water, or that it belongs to the state because it is not capable of private ownership, has no support in the statutes of the state or in any decision of this court.

The true reason for the rule that there can be no property in the corpus of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there can not be that possession of it which is essential to ownership. It is in this respect similar to the air, which can not be said to be possessed or owned by any person unless it is confined within impervious walls. One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream. Such right to the water of running streams as there is under the law is vested entirely in the several riparian owners along its course. It is subject to the common use of all riparian owners, but neither has a specific property in any part of the water

while it remains running in the stream. The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor. By the act of July 26, 1866 (ch. 262, 14 U. S. Stats. 251), the United States consented that private persons might acquire rights to water flowing in streams through its lands by taking possession thereof; that is, by diverting the same, in such manner as should be provided by the laws of the particular state. Where such diversion had not been made, a grant of its lands by the United States to a private person, without reservation, would carry with it the riparian rights pertaining to that land in streams flowing through it, in the same manner as in the case of a grant of land by a private owner. So, also, the state, with respect to the lands it owns which are not devoted to a specific public use, is in the same category as any other landowner. It has riparian rights, with respect to such land in the streams running over it, which its grant carries to the grantee. The provisions of the Civil Code above mentioned have the effect of a declaration by the state that any person who may divert water from a stream in pursuance of those provisions will thereby obtain a right in the stream paramount to the riparian rights which the state may have therein by virtue of the fact that the stream may run over lands then belonging to the state. To that extent it operates as a grant from the state, but this is only because the state had the riparian right, and not because the water was in any sense public water devoted to public use.

These questions received elaborate treatment in the leading case of Lux *v.* Haggin, 69 Cal. 255. On page 390 of 69 Cal., the fundamental principle is thus stated: "The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it." If this be true, then the right to the water is no more public than the right to the land. As to the title of the United States, it is said on page 336 of 69 Cal.: "The lands of the United States (not reserved or purchased for fortifications, etc.) are held, since the admission of the state into the Union, as are held the lands of private persons, with the exception that they are not taxable." It is further shown that even if it be conceded that prior to the cession from Mexico the government of that country possessed a title to the waters, or a power over them, which was in some respects public in its nature, a point not decided, nevertheless this title passed to the United States by the cession from Mexico, and afterwards, by the admission to the Union, passed from the United States to the state of California, and that the act of April 18, 1850, adopting the common law as the law of this state, "should now be held to have operated (at least from the admission into the Union) a transfer or

surrender to all riparian proprietors, of the property of the state, if any she had, in navigable streams and the soils below them." 69 Cal. 338. The riparian owners here referred to were the United States, the state itself with regard to school lands and other lands received from the United States, and the then existing purchasers from either of them. It also declares 69 Cal. 372: "As we have seen, one who, since the acts of Congress of 1866 and 1870, receives a grant of a portion of the public lands of the United States, without special or implied reservations, takes subject only to appropriations of water made or initiated prior to the grant." Referring to the effect of an appropriation with respect to state lands, it is said, 69 Cal. 374: "The state had granted the waters running to its own lands by authorizing the diversion of waters from its lands (referring to the Civil Code provisions), and doubtless such grantees acquire the state property in the waters whenever the state has a property in the waters at the time of the grant." The case then proceeds to state the reasons for the adoption of these provisions of the Code. As these seem now to be misunderstood by many, it may be well to again state the conditions which led to the enactment and the purpose sought to be attained.

At the time of the admission of California to the Union, and for many years afterwards, the lands embraced within its limits, excepting the Mexican grants, which were located mainly in the valleys, were, for the most part, the property of either the United States or of the state. There was urgent need for the use of the waters of the streams, especially in the mining operations which then constituted the main resource of the state. There were no laws provided whereby the right to divert and use these waters could be acquired from the state or from the United States. Both sovereignties, however, permitted such diversion by any one who could put the water to beneficial use. Diversions were accordingly made, and immediately there began to arise disputes relating to interfering diversions from the same stream, which speedily found their way into the courts, and it became necessary to ascertain the rules of law by which claims of that kind were governed. An analogy was found in the rules of the common law relating to controversies over the possession of land between persons who had no title thereto and in which the real owner did not interfere or intervene. See Katz *v.* Walkinshaw, 141 Cal. 135, 64 L. R. A. 236, 99 Am. St. 35. It was held that since the real owner of the water rights (that is, the United States or the state) permitted these diversions and was not in court to assert its rights or to be bound by the decision, the matter between the persons litigating was to be decided according to the rules of law in regard to priority of possession of land. The diversion of the water was declared to be the equivalent of possession, and the doc-

trine was laid down that he who was first in time was first in right. But it soon appeared that valuable rights were involved before there was or could be an actual diversion. The making of a dam was necessary before water could be taken, and this frequently required considerable time and the expenditure of large sums of money. It was necessary to define the rights which accrued from the labor and expense of constructing the diversion works, with respect to different works begun about the same time and before any actual diversion by either claimant. To meet this condition, the courts held that the person who first began the construction of such works, and did so in such manner that his intention to divert water thereby was manifest, was entitled to priority in the diversion subsequently made by him, provided he acted in good faith and prosecuted the work with reasonable diligence. The cases stating this doctrine are cited in Inyo C. W. Co. *v.* Jess, 161 Cal. 519. Difficult questions of fact would also, arise with respect to the actual dates of the beginning of work on the conflicting claims, questions which would generally have to be determined after the lapse of years and when the dates could not be satisfactorily ascertained. And it was also found that frequently a person intending to divert water would be put to great expense in the mere preparation necessary to begin the work and before any actual and visible operations upon the stream itself could be initiated. The provisions of the Civil Code, particularly section 1415, requiring the posting of a notice, section 1416, allowing 60 days within which to begin the "excavation or construction of the works," and section 1418, declaring that upon compliance with the Code the claimant's right would relate back to the time of the posting of the notice, were made to remedy and remove the practical difficulties which previously existed in adjudicating the rights of hostile claimants under these circumstances. Inyo C. W. Co. *v.* Jess, supra. There is absolutely nothing in this statute to indicate that the legislature supposed that the appropriation made in pursuance thereof was in the nature of a grant by the state of any property of the state in the water of the stream from which the diversion was to be made. As stated in Lux *v.* Haggin, supra, the statute was a consent by the state to the taking of the water so far as it infringed upon the riparian rights of the state by virtue of any lands which it might own situated upon the stream, and to that extent it operated as a grant. But that was a grant of a right which was private in its nature, a right pertaining to the particular tracts of land owned by the state and held by the state only because of such ownership. It was not a general right to the waters of the stream as a whole. And unless it happened that the state owned land upon the stream at the time of the diversion, a condition which in fact seldom occurred, the state would part with no right whatever by the appropriation. As we have seen, there was no existing public right in the waters which the state could transfer to the appropriator. The whole purpose of

the statute was to provide evidence whereby parties claiming under hostile diversions could establish their respective priorities and corresponding rights to the water and avoid the former difficulties in establishing the precise date of the inception of their respective enterprises. Inyo, etc., Co. *v.* Jess, supra, 161 Cal. page 520.

The appropriator under the Code obtains no title at all by his appropriation, as against any one except the state and the United States. Such right as he obtains from these he receives because of the fact that, by the law of 1866, and by the provisions of the Code, the United States and the state, respectively, have consented that he shall thereby obtain the rights pertaining to any public land over which the stream may run, and not because of any existing dedication of such waters to public use, or because of the fact that they are held by the United States or by the state for general public use. As against all other persons then interested in the riparian lands or in the water of the stream, he must acquire the right he claims in some other way than by the mere appropriation in compliance with the Code. He may do so by purchase and grant from such other claimants and owners, or he may do so by prescription; that is, by adverse use for the period of five years without interruption by the real owner. The only aid which his appropriation notice will afford him in establishing title by prescription against the riparian owner is that it may be admissible as evidence tending to show the date of the beginning of his hostile diversion. In suits against others as mere appropriators, it establishes the date of the inception of his right.

The proposition that the waters of a nonnavigable stream are in their nature private property and not property primarily devoted to public use is not only established by authority; it is demonstrable from well-established principles of the law of real property. The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on nonriparian land. This was decided as early as Hill *v.* Newman, 5 Cal.. 446, 63 Am. Dec. 140, where the court said: "The right to water must be treated in this state as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and, as such, has none of the characteristics of mere personalty." See, also, Lux *v.* Haggin, 69 Cal. 392; Santa Paula *v.* Peralta, 113 Cal. 43; Stanislaus W. Co. *v.* Bachman, 152 Cal. 725, 15 L. R. A. (N. S.) 359; Shurtleff *v.* Kehrer, 163 Cal. 26; Merritt *v.* Los Angeles, 162 Cal. 50; Copeland *v.* Fairview, etc., Co., 165 Cal. 148. Until some change is made in natural conditions, there is no existent right to the water of a stream, except that vested in the riparian owners. They alone can lawfully have access to the stream, and therefore they only, in a state of nature, may lawfully use it or divert it from the stream. Hence the

right to the water of flowing streams in this state, prior to any sale or disposition of lands by the state or by the United States, was vested in the state or in the United States, not in their respective governmental capacities as sovereign and for the common use of the people, but as riparian owners in their respective capacities as landed proprietors. These rights were and still are strictly proprietary and in their nature private. When land was disposed of by either, the riparian water right pertaining thereto passed to the purchaser as a part of that realty. It necessarily remained a private right, since the sale did not have the effect of dedicating it to public use. All these rights belong primarily to the riparian owners, consisting of the United States, the state, and purchasers from one or the other of them. They can not be divested from these riparian owners, and have not been divested from them, except by their consent, expressed, as by statute or by actual grant or contract, or implied, as by prescription, or by enforced taking for public use, as by condemnation. It follows that they remain private property when they pass to purchasers, and that, when they pass from the riparian owner to others by prescription, grant, or consent, they do not by that transfer become impressed with any public use, and it still remains true that there must be a dedication to public use to divest the private right. They are no more public than is the land to which they belonged and of which they formed a part.

Finally, on this point, the decisions in this state are to the same effect. Lux *v.* Haggin we have already mentioned. The recent case of Thayer *v.* California Development Co., 164 Cal. 125, states the rule to be that the right obtained by an appropriation under the Code is a private right; that the waters appropriated are not thereby appropriated to public use; and that they remain private property until the appropriator dedicates them to public use, which he may do or not at his own pleasure. The other cases holding this doctrine directly or in effect are cited in that case.

The result of these conclusions is that the Southern California Mountain Water Company did not dedicate the appropriated waters to public use by posting these notices; that whatever dedication it may have made of the waters to public use was made in some other manner; and that the territory to which that water is dedicated is not necessarily the same as the places of intended use named in the notices. That territory being far in excess of that which the water could supply, the dedication would be manifested by the act of carrying the water to some place and there selling it to those who apply, or by agreeing to supply some specified district with the water. The company has not supplied, or agreed to supply, the plaintiffs with water for irrigation. The water it has, according to the findings of the commission, is necessary to supply the inhabitants of the city of San Diego.

It follows that the plaintiffs have no right to receive additional

water from this supply for purposes of irrigation upon their lands, and that the order dismissing the proceeding is not injurious to them.

The order of dismissal is affirmed.[78]

We concur: Henshaw, J.; Lorigan, J.; Melvin, J.; Angellotti, J.

On Rehearing

Per Curiam. In a petition for rehearing the plaintiffs quote the opening clause of the amendment of April 8, 1911 (Stat. 1911, p. 821), to section 1410 of the Civil Code. The section formerly read as follows: "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation." By the amendment this was prefaced by the following declaration: "All water or the use of water within the state of California is the property of the people of the state of California." This, it is claimed, is contrary to the doctrine declared and followed in the opinion of this court herein. This section was not cited in the briefs upon which the case was submitted. We refer to it now solely in order to show that it has no application to the case. All the water rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not be necessary to remind any one that a law of this character is not retroactive, or that it can not operate to divest rights already vested at the time it was enacted.

The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land. It could not affect the riparian rights of the other owners, nor the rights of any person or corporation claiming under them, nor rights previously acquired from riparian owners by prescription, nor rights acquired from the state prior to that time by appropriation under the Code, in reliance upon the implied offer of the state to allow its riparian rights to be acquired in that manner, as indicated in the opinion.

The petition for a rehearing is denied.

[78] Cal. Civ. Code, § 1410, as amended in 1911, reads in part as follows:

"All water or the use of water within the state of California is the property of the people of the state of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law. * * *"

See White *v.* The Farmers' Highline, &c., Co., 22 Colo. 191, 43 Pac. 1028; Henning's Gen. Laws of Cal., 1914, Act 5500, pp. 2189 et seq.

KALAMA ELECTRIC LIGHT AND POWER CO. *v.* KALAMA DRIVING CO.

1908. SUPREME COURT OF WASHINGTON

48 Wash. 612, *94 Pac.* 469, *22 L. R. A. (N. S.)* 641n, *125 Am. St.* 948

CROW, J.—This action was commenced by the Kalama Light & Power Company, a corporation, against the Kalama Driving Company, a corporation, to enjoin the defendant from interfering with the natural flow of the waters of the Kalama river. An agreed statement of facts was filed, upon which the trial court made findings, and entered a decree enjoining and restraining the defendant from interfering with the usual and natural flow of water in the Kalama river through, upon, and by the plaintiff's land, and from using artificial dams for storing water and creating artificial freshets. The defendant has appealed.

The only question presented is whether this decree is supported by the findings. The findings of fact material to this question in substance show that the respondent, Kalama Light & Power Company, is a corporation organized under the laws of this state for the purpose of manufacturing and dealing in electric light and power; that it owns real estate on which its electric power plant, head gates, flumes, and other structures are located; that the Kalama river which passes over and through its lands, and from which it takes water for power purposes, is a swift mountainous stream about sixty miles in length, of sufficient width, depth, and capacity to be floatable for logs and other timber products during natural annual freshets of the fall, winter, and spring; that respondent's intake and head gates are located at low-water mark; that the river at all seasons by its natural flow furnishes water in sufficient quantities for the operation of the light and power plant; that after diverting the water through the intake and flumes the respondent returns it to the bed of the river, on its own premises; that respondent's plant is extensive and valuable, furnishing light and and power to inhabitants of Kalama and Woodland; that the Kalama Driving Company is organized for the purpose of clearing and improving navigable streams, especially the Kalama river, and driving, sorting, and delivering timber products; that it has complied with all the requirements of the laws of this state under which it is incorporated; that after respondent had installed its light and power plant, and had appropriated water for power, the appellant entered upon the river and commenced to improve the same by removing boulders, timbers, and other obstructions, by building wing dams, splash dams, and other structures, by creating artificial freshets upon which to drive logs during seasons when they could not be driven for the want of natural freshets; that an enormous amount of timber tributary to the river can be

profitably driven to market upon the stream, but that all of it can not be transported on the natural freshets, or without the aid of artificial freshets; that the appellant in conducting its business as a driving company is about to construct a large splash dam one-half mile above respondent's light and power plant, intending thereby to collect and store water for creating artificial freshets at seasons when no natural freshets occur; that at all times when the water is being collected by this dam its flow past respondent's land will temporarily cease; that it will require at least nine hours to collect and store the water each time the dam is closed, which will be a number of times each week; that while the dam is thus closed the respondent's plant will be compelled to remain idle for want of sufficient water to create power; that respondent is a riparian owner of land abutting upon the stream, being the land upon which its plant is located; and that it will be irreparably damaged if the appellant is permitted to continue its interference with the natural flow of the water.

The Kalama river is a navigable stream, being useful for the profitable floating of timber products at seasons when natural freshets occur. The appellant has under the laws of this state authority to improve the river, to clear it from obstructions, to construct wing dams, splash dams, and other improvements, and to collect and store water for artificial freshets, thereby extending the navigability of the stream for driving purposes. Appellant contends that in making such improvements it has a right to retard the natural flow of the water whenever necessary for the creation of artificial freshets, and to do so without interference from the respondent. It insists that the state itself has the right in the absence of congressional interference or control to improve all navigable streams for the purpose of securing better transportation facilities to the public; that it may do so without interference or protest from riparian owners whose land is not actually taken, destroyed, or submerged; that when it by statute authorized appellant and kindred corporations to make such improvements it delegated its own power and authority to them; that such delegation of authority is valid; that floatable streams are navigable public highways; and that the statutory right of driving companies to erect dams and other improvements, and to create artificial freshets on such floatable streams, thereby improving and extending their navigability for public use, has been sustained by this court—citing East Hoquiam Boom Co. *v.* Neeson, 20 Wash. 142; Watkins *v.* Dorris, 24 Wash. 636, 54 L. R. A. 199; Lownsdale *v.* Grays Harbor Boom Co., 36 Wash. 198; Dawson *v.* McMillan, 34 Wash. 269.

Having made the above contention, the appellant further insists that as long as it does not trespass upon or take physical possession of respondent's lands, does not flood or destroy any portion thereof, is not guilty of negligence while driving timber product or creating

artificial freshets, but confines its operations to the bed of the river, it will not be unlawfully interfering with any of respondent's riparian rights. In effect, it contends that any incidental damage resulting to respondent from its operations upon the river will be *damnum absque injuria*. In support of these contentions appellant cited numerous authorities, including the following cases from the states of Wisconsin, Maine and Oregon, upon which it predicates its principal arguments: Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134; Black River Imp. Co. *v.* La Crosse Booming, etc., Co., 54 Wis. 659, 41 Am. Rep. 66; Cohn *v.* Wausau Boom Co., 47 Wis. 314; Brooks *v.* Cedar Brook & S. C. R. Imp. Co., 82 Maine 17, 7 L. R. A. 460, 17 Am. St. 459; Weise *v.* Smith, 3 Ore. 445, 8 Am. Rep. 621; Felger *v.* Robinson, 3 Ore. 455. These authorities, which to some extent sustain appellant's position, can not be followed or approved by us if we are to continue in harmony with our previous holdings in Washington cases hereinafter mentioned.

The respondent, being a riparian owner upon the Kalama river, has, as such, valuable property rights, which can not be taken or damaged for the public use without compensation. One of these is its right to a continuance of the natural and ordinary flow of the water over, across, and past its lands. Gould on Waters (3d ed.), sec. 204. This riparian right, guaranteed by the common law, has been repeatedly recognized and protected by this court. In Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 496, 70 L. R. A. 272, 102 Am. St. 905, we said: "It being established that the stream is a navigable one, and that appellant shall not interfere with respondent's navigation of it, we must next inquire as to the methods and limitations of that navigation. The court refused to grant appellant an injunction preventing respondent from continuing the storage of water in Lake Reesiger, and the periodic flushing of the stream. We think this was error. Under well-established principles appellant is entitled to the natural flow of the water across his land. Crook *v.* Hewitt, 4 Wash. 749; Rigney *v.* Tacoma Light &. W. Co., 9 Wash. 576, 26 L. R. A. 425; New Whatcom *v.* Fairhaven Land Co., 24 Wash. 493, 54 L. R. A. 190. It is said that, although language used in the above cases declares the general principle, yet there was an actual threatened diversion of a substantial portion of the water in each case, while in the case at bar there is no diversion, but simply a detention, followed by a restoration of all the water before it reaches appellant's lands. This detention, however, amounts practically to a total detention for irregular periods, and at times unknown to appellant, without warning, it is released in such quantities as to greatly increase the natural flow, and according to testimony in the record, actually causes an overflow of his lands." In this case damages sustained by the respondent do not result from irregular and unexpected freshets created by the sudden release of water through splash dams, but they are caused by an interruption of the

natural flow of the river, depriving respondent of necessary water which as a riparian owner it is entitled to use in producing electric power. In Matthews *v.* Belfast Manufacturing Co., 35 Wash. 662, 666, we said: "The next contention is that the court erred in enjoining the appellant from floating logs down the stream by means of artificial freshets and splashes. The argument is that the stream is a navigable one, and that it has the right to use it for the purpose of floating logs, and is liable only for a misuse or abuse of the privilege, and that the evidence fails to show that there was any abuse or misuse in the present case. The stream in question is undoubtedly navigable for floating logs for a part of the year, and during that time the appellant, as well as others, may use it for that purpose. But that is not the case before us. The appellant was not attempting to float logs during the navigable season of the year, but was attempting to do so when the stream, in its natural state, would not float them. It sought to remedy this by creating unnatural conditions by the creation of artificial freshets which conditions damaged and destroyed the respondent's property. This was an abuse of the right of navigation, and for that an injunction would properly lie." See, also, White *v.* Codd, 39 Wash. 14.

The storing of water by the appellant's splash dams will so frequently and continuously retard the natural flow of the stream as to seriously interfere with and damage valuable riparian rights of the respondent. The operation of its light and power plant will be entirely obstructed while the water is being detained and stored by the dam. We are therefore compelled to hold that the appellant can not thus damage or interfere with respondent's riparian rights, which are property rights, without first making full compensation. The power of appropriation by condemnation has been conferred upon appellant so that it may, by an exercise of the right of eminent domain, take or damage the property and shore rights of riparian owners in a lawful manner, making full compensation therefor. The legislature, in conferring authority to improve the river and create artificial freshets, did not delegate to appellant the right to take or damage the respondent's property and shore rights without compensation. Any statute having such a purpose in contemplation would be in contravention of section 16, art. 1, of the state Constitution, and void. That the legislature never intended to violate the Constitution by attempting to confer such authority is disclosed by section 4388, Ballinger's Ann. Codes & Stat., which authorizes driving companies to appropriate, in proper condemnation proceedings, such property and shore rights of riparian owners as it may need for its use as a public service corporation. The recent case of Kamm *v.* Normand, 50 Ore. 9, is directly in point on the question of law here involved. In that case the Supreme Court of Oregon uses the following language: "Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other

times by artificial means, such as flooding and the like. No one has a right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means." In support of the above statement the court cites and discusses a number of authorities, including Matthews *v.* Belfast Mfg. Co., and Monroe Mill Co. *v.* Menzel, supra, decided by this court. It also distinguishes cases from Maine, Minnesota and Wisconsin, some of which are cited by appellant.

The recent case of Burrows *v.* Grays Harbor Boom Co., 44 Wash. 630, is in direct harmony with the views herein expressed. In State ex rel. Burrows *v.* Superior Court, 48 Wash. 286, we, in certiorari proceedings, afterwards sustained the holding of the trial judge that an appropriation of the right to erect splash dams and create artificial freshets past lands of a riparian owner was an appropriation of private property for public use. There is no doubt but that all the rights and powers for which appellant contends have been conferred on it by statute, subject, however, to the condition that in the exercise of such rights and powers it can not damage or take any of the property of riparian owners. If it wishes to damage or take such riparian rights for the public use, it is entitled to do so under an exercise of the power of eminent domain, unless such rights have been devoted to a prior public use.

The judgment is affirmed.[79]

Hadley, C. J., and Mount and Fullerton, JJ., concur. Dunbar and Root, JJ., took no part.

HUDSON COUNTY WATER COMPANY *v.* McCARTER

1908. SUPREME COURT OF THE UNITED STATES

209 U. S. 349, 28 Sup. Ct. 529, 25 L. ed. 828

Mr. Justice HOLMES delivered the opinion of the court:

This is an information alleging that the defendant (the plaintiff in error), under a contract with the city of Bayonne, in New Jersey, has laid mains in that city for the purpose of carrying water to Staten island, in the state of New York. By other contracts it is to get the water from the Passaic river, at Little Falls, where the East Jersey Water Company has a large plant by which the water is with-

[79] See Weise *v.* Smith, 3 Ore. 445, 8 Am. Rep. 621; Falls Mfg. Co. *v.* Oconto River Improvement Co., 87 Wis. 134, 58 N. W. 257; Sumner Lumber and Shingle Co. *v.* Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220.

drawn. On May 11, 1905, the state of New Jersey, reciting the need of preserving the fresh water of the state for the health and prosperity of the citizens, enacted that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." By a second section a proceeding like the present was authorized, in order to enforce the act. Laws of 1905, ch. 238, p. 461. After the passage of this statute the defendant made a contract with the city of New York to furnish a supply of water adequate for the borough of Richmond, and of not less than 3,000,000 gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic river out of the state. There are allegations as to the amount of water and the probable future demand, upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other states, and denies to them the equal protection of the laws. An injunction was issued by the chancellor, McCarter *v.* Hudson County Water Co., 70 N. J. Eq. 525, the decree was affirmed by the court of errors and appeals, McCarter *v.* Hudson County Water Co., 70 N. J. Eq. 695, and the case then was brought here.

The courts below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor; and, on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the court of errors and appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the state. It reinforced the state's rights by the state's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the state was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in

error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute owners of the stream, on the ground that it authorized a suit by the state in their interest, where it does not appear that they all have released their rights. See Kansas *v.* Colorado, 185 U. S. 125, 142, 46 L. ed. 838, 844, 22 Sup. Ct. 552. But we prefer to put the authority, which can not be denied to the state, upon a broader ground than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance can not be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas *v.* Colorado, 185 U. S. 125, 141, 142, 46 L. ed. 838, 844, 845, 22 Sup. Ct. 552; 206 U. S. 46, 99, 51 L. ed. 956, 975, 27 Sup. Ct. 655; Georgia *v.* Tennessee Copper Co., 206 U. S. 230, 238, 51 L. ed. 1038, 1044, 27 Sup. Ct. 618. What it may protect by suit in this court from interference in the name of property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case. Geer *v.* Connecticut, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. 600.

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors can not be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the 14th amendment is disposed of by what we have said. That under article 1, sec. 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, can not remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter. Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, 438, 47 L. ed. 887, 892,, 23 Sup. Ct. 531; Manigault *v.* Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. 127. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.

The other defenses also may receive short answers. A man can not acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. 600,

and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See Asbell *v.* Kansas, 209 U. S. 251, ante, 485, 28 Sup. Ct. 485. The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. Within the boundary, citizens of New York are as free to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the court of errors and appeals was right.

Decree affirmed.[80]

Mr. Justice McKenna dissents.

[80] See Cal. Stat. 1911, ch. 104, Henning's Gen. Laws Cal. 1914, pp. 2232-2233; Ore. Stat. 1911, ch. 224, p. 404.

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